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No. ____ OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1995

COEUR d'ALENE TRIBE,

Petitioner,

v.

STATE OF IDAHO,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

RAYMOND C. GIVENS*
GIVENS, FUNKE & WORK
424 Sherman Avenue, Suite 308
Coeur d'Alene, Idaho 83814
(208) 667-5486

Attorneys for Petitioner

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTION PRESENTED

The Indian Gaming Regulatory Act (IGRA) 25 U.S.C. 2701, et seq. divides Indian gaming into three classes: Class I (traditional games), Class II (bingo and related games) and Class III (all other gaming). An Indian tribe wishing to conduct Class III gaming must first negotiate and enter into a "compact" with "a state that permits such gaming for any purpose by any person, organization or entity . . . " 25 U.S.C. 2710(d)(1)(B). This case presents the general question of what gaming is negotiable in those compact negotiations.

In determining what Class III gaming is negotiable under IGRA, are a state's gaming laws to be viewed in general terms under the "civil regulatory/criminal prohibitory" analysis of *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987) referred to in the IGRA's legislative history making all gaming or broad categories of gaming negotiable, or are the state gaming laws to be viewed in minute detail, limiting negotiations to only the exact games and terms of state law?

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STATE OF IDAHO,

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Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

The Coeur d'Alene Tribe petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals, App. at 1, is reported at 51 F.3d 876 (9th Cir. 1995). The denial of the request for rehearing, App. at 3, is currently unreported. The opinion of the District Court, App. 4, 6, is reported at 842 F.Supp. 1268 (D.Id. 1994).

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). The Court of Appeals entered its judgment on April 6, 1995 and denied the Petition for Rehearing on May 19, 1995. This appeal is timely filed pursuant to Supreme Court Rule 13.1, 13.4.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The primary statutory provisions involved in the case are 25 U.S.C. 2701(4) and (5) and 25 U.S.C. 2710(d)(1).

25 U.S.C. 2701. Congressional findings

The Congress finds that –

* * *

(4) a principal goal of Federal Indian policy is to promote tribal economic development, tribal self-sufficiency, and strong tribal government; and

(5) Indian tribes have the exclusive right to regulate gaming activity on Indian lands if the gaming activity is not specifically prohibited by Federal law and is conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity.

25 U.S.C. 2710. Tribal gaming ordinances

* * *

(b) Regulation of Class II gaming activity; net revenue allocation; audits; contracts

> (1) An Indian tribe may engage in, or license and regulate, class II gaming on Indian lands within such tribe's jurisdiction, if –
>
> > (A) such Indian gaming is located within a State that permits such gaming for any purpose by any person, organization or entity (and such gaming as not otherwise specifically prohibited on Indian lands by Federal law), . . .
>
> * * *
>
> (d) Class III gaming activities; authorization; revocation; Tribal-State compact
>
> (1) Class III gaming activities shall be lawful on Indian lands only if such activities are –
>
> > (A) authorized by an ordinance or resolution that –
> >
> > (i) is adopted by the governing body of the Indian tribe having jurisdiction over such lands,
> >
> > (ii) meets the requirements of subsection (b) of this section, and
> >
> > (iii) is approved by the Chairman,
> >
> > (B) located in a State that permits such gaming for any purpose by any person, organization or entity,
> >
> > (C) conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State under paragraph (3) that is in effect.

Other constitutional, statutory, and legislative history provisions involved in the case are lengthy. The pertinent

text of these provisions are set out in the appendix. They are:

Constitutions

U.S. Constitution, Article 1 § 8, Clause 3, Idaho Constitution, Article III, § 20 (original and amended versions)

Statutes

25 U.S.C. 2701, 25 U.S.C. 2702, 25 U.S.C. 2703, 25 U.S.C. 2710, 28 U.S.C. 1254, I.C. 18-3801, I.C. 18-3809, I.C. 18-3810, I.C. 54-2502, I.C. 54-2512, I.C. 67-7401, I.C. 67-7404, I.C. 67-7447

Legislative History

100th Congress Second Session, S.Rep. No. 100-446.

STATEMENT OF THE CASE

This case squarely addresses one of the most important issues in the entire Indian gaming field. This issue is what gaming is negotiable in Class III gaming compact negotiations between an Indian tribe and a state.

Congress has addressed Indian gaming in the Indian Gaming Regulatory Act (IGRA) 25 U.S.C. 2701 et seq. IGRA divides Indian gaming into three classes. They are Class I (traditional games) 25 U.S.C. 2703(6), Class II (bingo and related games) 25 U.S.C. 2703(7), and Class III (all other gaming), 25 U.S.C. 2703(8). IGRA requires that an Indian tribe which wishes to conduct Class III gaming must enter into a "compact" with the state through a procedure outlined in the statute. 25 U.S.C. 2710(d).

The Coeur d'Alene Tribe (Tribe) initiated this statutory Class III compact negotiation process with the State of Idaho (State) on April 15, 1992. The parties could not agree on the extent of gaming that was negotiable. The Tribe considered all Class III gaming, or broad categories of Class III gaming, to be negotiable. The State considered only the exact types of Class III games actually conducted by the State to be negotiable.

To resolve this impasse, the parties agreed to enter into a Class III Gaming Compact in which it was agreed (1) that the Tribe could conduct the exact types of gaming the State conducted, and (2) that the parties would litigate the issue of whether other Class III gaming was negotiable. The Compact also contained a provision for negotiating and adding other gaming to the Compact if the Tribes prevailed in the litigation. App. at 63. The Class III Compact was approved by the Secretary of Interior. Federal Reporter Vol. 58 No. 28, p. 8478, February 12, 1993.

Because of the procedural way this case developed, the question of what Class III gaming is negotiable is squarely presented in a way that is applicable throughout the United States to every tribe/state Class III compact negotiation that is currently being conducted or will be conducted in the future.

At the time the Tribe initiated the IGRA Class III gaming compact process, the State's Class III gaming scheme consisted of lotteries, parimutuel betting and games

of chance. Original Idaho Constitution[1], Article III § 20. App. at 52. Some types of these three gaming categories were conducted by the State, other types were not. Allowed lotteries were any lottery conducted by the State itself. Original Idaho Constitution, Article III § 20, I.C. 67-7401. App. at 52, 61. When the Compact negotiations began the Idaho State Lottery Commission was conducting three types of lotteries (1) the numbers game generally referred to as lotto (Powerball), (2) pull tabs, and (3) scratch-off games. Gaming such as slot machines, which had been held to be lotteries in the State, *State v. Garden City*, 265 P.2d 328 (Idaho 1953), were generally prohibited, Original I.C. 18-3801, 3809, 3810. App. at 54, 55, 56. Slot machines and other restricted lotteries could, however, have been conducted by the State's Lottery Commission because of the State's unique gaming scheme.[2] I.C. 67-7404(14), (15), 67-7447. App. at 61, 62. Parimutuel betting was allowed on the racing of horses, dogs and mules, but not on other racing. Original Idaho Constitution, Article III § 20(b), I.C. 54-2502, 2512. App. at 52, 58-60. Games of chance (all types of gaming) were allowed if operated by qualified charitable organizations, but not otherwise. Original Idaho Constitution, Article III § 20(c). App. at 52.

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[1] The State changed the gaming provisions of its Constitution and statutes during the Compact negotiations. The State law in effect at the time the Compact negotiation began has been referred to as "Original." The State law as amended has been referred to as "Amended." The question of which of these two gaming schemes should be applicable to the negotiations was raised in the Circuit, but not decided as a result of the manner in which the Circuit disposed of the case. See App. 1.

[2] I.C. 67-7447 exempted the State Lottery Commission from the entirety of the statute that otherwise prohibited gambling.

There was no statutory regulation of charitable games of chance.

Soon after the Compact negotiation process began, State officials called a rare special session of the State legislature to address gaming matters. During the negotiation period the State changed various State gaming statutes and placed a proposed constitutional amendment on the ballot of the fall election.[3] This lawsuit was filed just prior to the vote on the constitutional amendment in the 1992 November election. The proposed changes to the State constitution were adopted.[4]

The State's new gaming scheme still allowed all types of Class III gaming in some form. Any type of gaming was allowed so long as the "prize" was "only additional play."[5] Amended Idaho Constitution, Article III, § 20(4)(b), App. at 53. There was no limit on the amount of "additional play" which could be awarded, nor was there any limit on selling the "additional play" that had been won.

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[3] Under Idaho law, changes in the constitution are to be made upon the adoption of a joint resolution of the legislature and a vote of the majority of the voters at the next election.

[4] The Idaho Supreme Court has held that the State legislature's intent in changing the State's gaming law was to restrict Indian gaming. Although the Court was divided on other issues in the case, it was unanimous on this point. *Nez Perce Tribe v. Cenarrusa*, 867 P.2d 911 (Id. 1993).

[5] This type of gaming was defined as "not gambling," but it still contained all of the elements of "chance, consideration and prize" which *State v. Garden City*, 265 P.2d 328 (Idaho 1953) had held were the elements of a "lottery".

Lotteries were still allowed if run by the State's Lottery Commission, except that constitutional restrictions on the Commission's discretion in selecting the types of lotteries were added. Amended Idaho Constitution, Article III, § 20(1)(a)(2). App. at 53. Parimutuel betting was still allowed if conducted on horse, dog or mule racing. Amended Idaho Constitution, Article III, § 20(1)(b). I.C. 54-2502, 2512. App. at 53, 58. Other allowed games of chance were limited to "bingo and raffle games" conducted by "qualified charitable organization." Amended Idaho Constitution, Article III, § 20(1)(c). App. at 53.

This lawsuit was filed under the terms agreed to in the Class III Compact. App. at 63. The District Court granted summary judgment for the State. App. at 4, 6. It held that (1) only the exact Class III games played by the State were negotiable under IGRA, App. at 4-5, 25-37, 42-43, and (2) the IGRA Class III gaming Compact negotiations were controlled by the new State law which had been adopted in the middle of the negotiations. App. at 4, 22-25, 42.

Although the District Court made reference to the broad "civil regulatory/criminal prohibitory" approach of *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987) and the IGRA legislative history, in actuality it did not employ that approach. The District Court did not discuss in any way the provision of Amended Idaho Constitution, Article III, § 20(4)(b) which allows all games where the prize is "only additional play." App. at 36. In fact, when the District Court quoted the Amended Idaho Constitutional provision, it left off section (4) altogether. App. at 8-9. See App. at 53 for a complete version of Amended Idaho Constitution, Article III, § 20.

The District Court also did not apply the *Cabazon* broad "civil regulatory/criminal prohibitory" analysis to lotteries. If it had, the result would have been very different. To paraphrase *Cabazon* as applied to this case, the State regulates rather than prohibits gaming in general and lotteries in particular. The District Court's ruling meant that the only Class III gaming that was negotiable was the Class III gaming which had already been agreed to in the Class III Gaming Compact.

On appeal the Ninth Circuit summarily affirmed the District Court's judgment, citing *Rumsey Indian Rancheria of Wintun Indians v. Wilson*, 41 F.3d 421 (9th Cir. 1994) and the District Court's analysis.[6] App. at 1. The Ninth Circuit did not address the issue regarding which State law was applicable. Rehearing was requested and denied. App. at 3.

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[6] *Rumsey* was amended on denial of rehearing and rejection of suggestion for rehearing *en banc* Slip Opinion p. 9975, August 11, 1995. As of this writing that decision is not reported, even on Westlaw. The earlier *Rumsey* opinion, which formed the basis of the Ninth Circuit's opinion in this case, was not materially modified. The *Rumsey* dissent from the rejection of the suggestion for rehearing *en banc* is set out in the Appendix at 73. Since the decision in this case made specific reference to the original *Rumsey* decision, the *Rumsey* quotations and citations in this Petition are from that original *Rumsey* Ninth Circuit opinion.

REASON FOR GRANTING THE WRIT

CONFLICT BETWEEN THE CIRCUITS ON IMPORTANT FEDERAL QUESTION

A. Analytical Overview

This case addresses one of the most important issues in the entire Indian gaming law field.[7] This issue is what gaming is negotiable in Class III Compact negotiations between an Indian tribe and a state. This issue has repeatedly arisen since the passage of the Indian Gaming Regulatory Act (IGRA) 25 U.S.C. 2701 et seq. seven years ago,[8] and is squarely presented by this case.

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[7] The other major dispute involving Indian gaming has been the Eleventh Amendment defense various states raise in the litigation under IGRA. Certiorari has been granted regarding that issue in *Seminole Tribe of Florida v. Florida*, ___ U.S. ___, 115 S.Ct. 932, 130 L.Ed.2d 878 (1995) to be decided this term. If certiorari is granted in this case, the Court will have before it the two major issues that have most plagued the implementation of IGRA since its adoption in 1988.

[8] *Sycuan Band of Mission Indians v. Roache*, 788 F.Supp. 1498, affirmed 54 F.3d 535 (9th Cir. 1995); *Willis v. Fordice*, 850 F.Supp. 523 (S.D. Miss. 1994), affirmed 55 F.3d 633 (1995); *Rumsey Indian Rancheria of Wintun Indians v. Wilson*, 41 F.3d 421, (9th Cir. (Cal.) 1994); *Yavapai-Prescott Indian Tribe v. State of Arizona*, 796 F.Supp. 1292 (D.Arizona 1992); *Mashantucket Pequot Tribe v. Connecticut*, 913 F.2d 1024 (2nd Cir. 1990), cert denied, 499 U.S. 975, (1991); *Ysleta Del Sur Pueblo v. State of Texas*, 852 F.Supp. 587, reversed on other grounds, 36 F.3d 1325 (5th Cir. 1994), cert denied 115 S.Ct. 1358, 131 L.Ed.2d 215; *Cheyenne River Sioux Tribe v. State of South Dakota*, 830 F.Supp. 523 (D.S.D., 1993), 3 F.3d 273 (8th Cir. (S.D.)); *U.S. v. Sisseton-Wahpeton Sioux Tribe*, 804 F.Supp. 1199 (D.S.D., 1992) reversed and remanded 897 F.2d 358 (8th Cir. (S.D.)); *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Wisconsin*, 770 F.Supp. 480 (W.D. Wis., 1991), appeal dismissed,

The importance of the federal issue presented by this case, the conflict between the Eighth and Ninth Circuits and the Second Circuit and the fallacy of the Ninth Circuit's reasoning in *Rumsey* (and therefore in this case) is well stated by Judge Canby in his dissent from the rejection of the suggestion for rehearing *en banc* in *Rumsey*.

> This is a case of major significance in the administration of the Indian Gaming Regulatory Act ("IGRA") and it has been decided incorrectly, in a manner that conflicts with the Second Circuit's interpretation of the same statutory language. The result is to frustrate the scheme of state-tribal negotiation that Congress established in IGRA. We should have granted rehearing en banc to prevent the near-nullification of IGRA in a circuit that encompasses a great portion of the nation's Indian country. Our failure to do so may close the only route open to many tribes to escape a century of poverty.
>
> *Rumsey* holds that California, which permits several varieties of Class III gambling, has no duty under IGRA to negotiate with the tribes over the tribes' ability to conduct any game that is illegal under California law. This ruling effectively frustrates IGRA's entire plan governing Class III Indian gaming. . . .
>
> [T]he Second Circuit, in arriving at a conclusion precisely opposite to that of *Rumsey*, stated:
>
> > Under the State's approach, . . . even where a state does not prohibit class III gaming as

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957 F.2d 515 (7th Cir. 1992) cited with approval *Forest County Potawatomi v. Norquist*, 45 F.3d 1079 (7th Cir. 1995).

> a matter of criminal law and public policy, an Indian tribe could nonetheless conduct such gaming only in accord with, and by acceptance of, the entire state corpus of laws and regulations governing such gaming. The compact process that Congress established as the centerpiece of the IGRA's regulation of class III gaming would thus become a dead letter, there would be nothing to negotiate, and no meaningful compact would be possible. Mashantucket Pequot Tribe v. Connecticut, 913 F.2d 1024, 1030-31 (2d Cir. 1990) [FOOTNOTE]
>
> [FOOTNOTE] We recognize that Rumsey's approach is supported by the Eighth Circuit, Cheyenne River Sioux Tribe v. South Dakota, 3 F.3d 273 (8th Cir. 1993), but for the reasons stated we believe that the Second Circuit has much the better overview of IGRA.
>
> The Second Circuit's fears of turning IGRA's compact process into a dead letter are well-founded.
>
> * * *
>
> *Rumsey*, has thus misconstrued IGRA's Class III gaming provisions, and has done so in a manner that defeats Congress's intention and causes great economic harm to numerous tribes. . . .

Rumsey Indian Rancheria of Wintun Indians v. Wilson, 9th Cir. 93-16609, Slip Opinion 9975 at 9982, 3, 7 (Circuit Judge Canby dissenting from rejection of suggestion for rehearing *en banc*). App. at 73.

There can be little doubt that the author of this dissent, and those who joined with him, feel review of

this issue is appropriate as an important federal question on which the Circuits are divided.[9]

This IGRA Compact negotiation requirement has led to heated disputes between states and Indian tribes over what gaming is negotiable in the Class III Compact negotiations. States have generally felt that the gaming negotiations ought to be confined to the strict limits of state law. Indian tribes have felt that Congress intended a much broader approach of allowing negotiation of all Class III gaming, or broad categories of Class III gaming, if the state conducted any Class III gaming.

The Circuits are divided on how to resolve this important federal question.

The Second, Fifth and Seventh Circuits have adopted a broad "civil regulatory/criminal prohibitory" approach to this federal question.[10] Relying on the operable language of IGRA, the legislative history and this Court's prior holding in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987), these three Circuits have

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[9] Judge Canby is the author of one of the two or three most useful publications to the Indian law practitioner. American Indian Law In a Nutshell, William C. Canby, Jr., West Publishing Co., 1983.

[10] The individual cases will be discussed after this brief overview. The cases are: *Mashantucket Pequot Tribe v. Connecticut*, 913 F.2d 1024 (2nd Cir. 1990); *Willis v. Fordice*, 850 F.Supp. 523 (S.D. Miss. 1994), affirmed without opinion 55 F.3d 633 (5th Cir. 1995); and *Forest County Potawatomi v. Norquist*, 45 F.3d 1079 (7th Cir. 1995) (citing with approval *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Wisconsin*, 770 F.Supp. 480).

looked at the broad categories of gaming activity to determine what is negotiable in a Class III Compact. If a broad category of gaming activity is permitted in some way under State law, then that category is generally negotiable in Class III Compact negotiation, even if State law criminally regulates portions of it. The only limitation is if an entire gaming activity is specifically criminally prohibited.

Recently the Eighth Circuit distinguished the broad "civil regulatory/criminal prohibitory approach" it had used for Class II gaming and adopted an approach of limiting the negotiation of Class III gaming to the specific limitations of state law. This approach will be referred to as the narrow "specific state game" approach. This "specific state game" analytical approach was followed by the Ninth Circuit and was applied in this case.[11] Rather than look at broad categories of gaming, the Eighth and Ninth Circuits look with minute detail at each specific state law regarding type of game, or size of bet (consideration) or prize to determine what gaming is negotiable. Class III gaming negotiations in the Eighth and Ninth Circuits have thus been restricted to the exact limits of the state's law, rather than to the broad categories approach of the Second, Fifth and Seventh Circuits.

The approach of the Eighth and Ninth Circuits (1) limits the economic development potential to Indian

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[11] Each case will later be discussed in detail. The cases are *U.S. v. Sisseton-Wahpeton Sioux Tribe*, 897 F.2d 358 (8th Cir. 1990); *Cheyenne River Sioux Tribe v. South Dakota*, 3 F.3d 273 (8th Cir. 1993); *Rumsey Indian Rancheria of Wintun Indians v. Wilson*, 41 F.2d 421 (9th Cir. 1994).

tribes that Congress had sought to achieve in adopting IGRA, 25 U.S.C. 2701(4), 2702(1). App. at 47; (2) fails to apply to Class III gaming the IGRA Class II legislative history, instructing that the broad "civil regulatory/criminal prohibitory" analysis of this Court's *Cabazon* decision should be followed and that the traditional rules of statutory construction in Indian cases should be followed,[12] 100th Congress Second Session, S.Rep. No. 100-446 at 6, 9, 11-12. App. at 69; and (3) involves federal courts in the minutia of interpreting state gaming law to determine which exact games, bet sizes, prize sizes and other items are negotiable.

To summarize the approaches of the various Circuits, there are three Circuits (Second, Fifth and Seventh) which use the broad "civil regulatory/criminal prohibitory" approach for Class III gaming. Two other Circuits (Eighth and Ninth) use the broad "civil regulatory/criminal prohibitory" approach for Class II gaming, but the narrow "specific state game" approach for Class III gaming.

B. Analysis of Conflicting Decisions

The Second Circuit adopted the broad "civil regulatory/criminal prohibitory" approach in *Mashantucket Pequot Tribe v. Connecticut*, 913 F.2d 1024 (2nd Cir. 1990).

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[12] The traditional rules of statutory construction in Indian cases are that any restriction of tribal sovereign rights must be expressly set out in the statute, *U.S. v. Dion*, 476 U.S. 734, 738 (1986), and that statutory ambiguities in statutes passed for the benefit of Indian tribes must be interpreted in favor of the tribes. *Bryan v. Itasca County*, 426 U.S. 373 (1976).

The issue was whether all casino gaming was negotiable if the state allowed charitable casino nights.

The Second Circuit found the IGRA findings at 25 U.S.C. 2701(5) consistent with the broad "civil regulatory/criminal prohibitory" approach of *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987). Further the Second Circuit noted that the IGRA legislative history instructing that the *Cabazon* approach should be followed for Class II analysis was also applicable to Class III because the operable statutory language was nearly identical. *Mashantucket Pequot Tribe v. Connecticut*, 913 F.2d 1024, 1030, n.6 (2nd Cir. 1990).

The Second Circuit rejected the state's argument that the negotiations should be restricted to the exact limits of state law, stating:

> The compact process is therefore to be invoked unless, applying the Cabazon test, it is determined that the state, 'as a matter of criminal law and public policy, prohibit[s] (class III) gaming activity.' § 2701(5). Absent such a conflict, the interests of the tribe and state are to be reconciled through the negotiation of a compact, . . .
>
> Under the State's approach, on the contrary, even where a state does not prohibit class III gaming as a matter of criminal law and public policy, an Indian tribe could nonetheless conduct such gaming only in accordance with, and by acceptance of, the entire state corpus of laws and regulations governing such gaming (footnote omitted). The compact process that Congress established as the centerpiece of the IGRA's regulation of class III gaming would

> thus become a dead letter, there would be nothing to negotiate, and no meaningful compact would be possible.

Mashantucket Pequot Tribe v. Connecticut, 913 F.2d 1024, 1030-1031 (2nd Cir. 1990).

The Second Circuit used the broad "civil regulatory/criminal prohibitory" approach to hold that *all* casino gaming was negotiable as a result of the state's charitable casino nights. The result has been the enormously successful Mashantucket Pequot Tribe casino at Foxwood, Connecticut which generates millions of dollars in economic development revenue for that tribe.

The Fifth Circuit adopted the broad "civil regulatory/criminal prohibitory" approach by reference when it affirmed without opinion the District Court's decision in *Willis v. Fordice*, 850 F.Supp. 523 (S.D. Miss. 1994), affirmed 55 F.3d 633 (1995). The issue was whether Class III gaming by the Mississippi Choctaws had to be conducted on navigable water because of such a limitation on other state gaming. Relying on *Mashantucket Pequot v. Connecticut*, 913 F.2d 1024 (2nd Cir. 1990) and the IGRA legislative history, the District Court held that the state restriction was not controlling. The tribe's Class III gaming did not have to be conducted on navigable waters. *Willis v. Fordice*, 850 F.Supp. 523 (S.D. Miss. 1994). The Fifth Circuit affirmed without opinion 55 F.3d 633 (1995).

The Seventh Circuit adopted the broad "civil regulatory/criminal prohibitory" approach by reference in *Forest County Potawatomi v. Norquist*, 45 F.3d 1079, 1083 (7th Cir. 1995) when it cited with approval the analysis in a

prior District Court decision in that Circuit. *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Wisconsin*, 770 F.Supp 480 (W.D. Wis. 1991), appeal dismissed 957 F.2d 515 (7th Cir. 1992). *Forest County Potawatomi* also gently rejected a suggestion it follow the Ninth Circuit's new narrow "specific state game" approach, *Forest County Potawatomi v. Norquist*, 45 F.3d at 1083, fn 1.

In *Lac du Flambeau* the Court was presented with a state gaming scheme almost identical to the one in this case. The state operated some types of lotteries (pulltabs, scratch-off games and on-line numbers games or lottos such as Lotto America and parimutuel betting on horse racing), *Lac du Flambeau v. Wisconsin*, 770 F.Supp at 483. Other lotteries such as slot machines or casino games were not permitted, *Lac du Flambeau v. Wisconsin*, 770 F.Supp at 484. In Wisconsin, as in Idaho, lotteries were defined as any game of prize, chance and consideration, *Lac du Flambeau v. Wisconsin*, 770 F.Supp at 486. *State v. Garden City*, 265 P.2d 328, 331 (Idaho 1953). Wisconsin's gaming scheme in *Lac du Flambeau* is nearly identical to Idaho's.

The Court in *Lac du Flambeau* analyzed the state's gaming policy with reliance on *Cabazon*, the Second Circuit's approach in *Mashantucket Pequot* and the Eighth Circuit approach in *U.S. v. Sisseton-Wahpeton Sioux Tribe*, 897 F.2d 358 (8th Cir. 1990). The Court in *Lac du Flambeau* (1) found the State's gaming policy to be civil regulatory, not criminal prohibitory; (2) that the State did not prohibit the "gaming activities" and (3) that the negotiations were *not* limited to "the identical types of games currently offered by the lottery board . . . " Specifically the Court found:

> It was not Congress' intent that the state would be able to impose their gaming regulatory schemes on the tribes.

Lac du Flambeau Band of Lake Superior Chippewa Indians v. Wisconsin, 770 F.Supp. 480, 487 (W.D. Wis. 1991).

The District Court went on to hold that the state must negotiate all gaming activities which were "not prohibited expressly by the Wisconsin Constitution or state law." *Lac du Flambeau v. Wisconsin*, 770 F.Supp. at 488. The result has been the lucrative Indian casinos in the Milwaukee and Green Bay area which form the basis for tribal economic development in those areas.

The Eighth Circuit adopted the "broad civil regulatory/criminal prohibitory" approach in *U.S. v. Sisseton-Wahpeton Sioux Tribe*, 897 F.2d 358 (8th Cir. 1990). The issue there was whether blackjack had to be conducted in accordance with the state's "wager limits and other gaming constraints." *U.S. v. Sisseton-Wahpeton Sioux Tribe*, 897 F.2d at 363 (8th Cir. 1990). This case was decided under a Class II analysis because of a special grandfathering provision of IGRA, but as noted in *Mashantucket Pequot Tribe v. Connecticut*, 913 F.2d 1024, 1030 n.6 (2nd Cir. 1990) the operable language of the two IGRA statutory provisions is nearly identical.

In *U.S. v. Sisseton-Wahpeton Sioux Tribe*, 897 F.2d 358 (8th Cir. 1990) the Eighth Circuit held:

> . . . [W]e believe that the legislative history reveals that Congress intended to permit a particular gaming activity, even if conducted in a manner inconsistent with state law, if the state law merely regulated, as opposed to completely barred, that particular gaming activity. . . .

> . . . The phrase 'for any purpose by any person, organization or entity' makes no distinction between State laws that allow class II gaming for charitable, commercial, or governmental purposes, or the nature of the entity conducting the gaming. If such gaming is not criminally prohibited by the State in which tribes are located, then tribes, as governments, are free to engage in such gaming. S.Rep.No. 100-446, supra, at 12, 1988 U.S. Code Cong. & Admin.News 3082 (emphasis added).

U.S. v. Sisseton-Wahpeton Sioux Tribe, 897 F.2d 358, 365 (8th Cir. 1990).

This Eighth Circuit decision was later distinguished in *Cheyenne River Sioux Tribe v. South Dakota*, 3 F.3d 273 (8th Cir. 1993) which adopted the narrow "specific state game" approach discussed below.

Regarding Class II gaming, the Ninth Circuit recently adopted the "broad civil regulatory/criminal prohibitory" approach in *Sycuan Band of Mission Indians v. Roache, et al.*, 54 F.3d 535 (9th Cir. 1995). The issue was whether a state could enforce its gaming criminal laws regarding electronic games on an Indian reservation. In concluding that the state could not, the Court examined the *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987) broad "civil regulatory/criminal prohibitory test."

> We express no opinion concerning Class III, but at least insofar as the State's argument is directed at Class II-type gaming, of the sort engaged in by the Tribes in Cabazon Band, the state cannot regulate and prohibit, alternately, game by game and device by device, turning its public

> policy off and on by minute degrees. [Footnote omitted] Cabazon Band addressed the problem at a higher level of generality than that.

Sycuan Band of Mission Indians v. Roache, et al., 38 F.3d 402, 407 (9th Cir. 1994) (emphasis added). The Ninth Circuit specifically rejected this approach for Class III gaming in the recent modifications on denial of rehearing in *Rumsey Indian Rancheria of Wintun Indians v. Wilson*, 9th Cir. 93-16609, Slip Opinion at 9994, fn.4. Although the context of *Sycuan Band* is slightly different, the analytical principal employed is consistent with that used by the Second, Fifth, Seventh and earlier Eighth Circuit decision. All of these cases conclude that the question of what "gaming is permitted" should be addressed with a broad "civil regulatory/criminal prohibitory" approach, or at a "higher level of generality" than a "game by game" or "device by device" analysis.

The Eighth Circuit has now rejected the broad "civil regulatory/criminal prohibitory" approach in favor of a narrow "specific state game" approach to what is negotiable. In *Cheyenne River Sioux Tribe v. South Dakota*, 3 F.3d 273 (8th Cir. 1993) the Eighth Circuit considered the question of what was negotiable in an IGRA Class III Compact negotiation. The state played one form of Keno, but not another. The bet limit (consideration) was $5. The Eighth Circuit (1) ignored the extensive IGRA legislative history forming the basis of the cases discussed above, (2) held that a state need only negotiate the *exact type of a game* that it played, and (3) held that a state could refuse to negotiate pot size (consideration) that exceeded the state statutory limit.

> We agree with the state that it need not negotiate traditional keno if only video keno is permitted in South Dakota. The "such gaming" language of 25 U.S.C. § 2710(d)(1)(B) does not require the state to negotiate with respect to forms of gaming it does not presently permit. Because video keno and traditional keno are not the same and video keno is the only form of keno allowed under state law, it would be illegal, in addition to being unfair to the other tribes, for the tribe to offer traditional keno to its patrons. Therefore, we agree with the district court that the state did not refuse to negotiate in good faith on the tribe's operation of traditional keno.
>
> . . . The state distinguishes the "grandfathered" blackjack games at issue in U.S. v. Sisseton-Wahpeton Sioux Tribe, 897 F.2d 358 (8th Cir. 1990)(higher bet limits on games established before effective date of IGRA).
>
> We agree with the state that it need not negotiate regarding bet limits because bet limits are established by state law. The state is not obligated to allow the tribe to operate under bet limits higher than the state statutory limit of $5. Accordingly, we agree with the district court that the state did not refuse to negotiate in good faith on the issue of higher bet limits.

Cheyenne River Sioux Tribe v. South Dakota, 3 F.3d 273, 279 (8th Cir. 1993).

The Ninth Circuit followed the Eighth Circuit lead in adopting the narrow "specific state game" approach for Class III in *Rumsey Indian Rancheria of Wintun Indians v. Wilson*, 41 F.3d 421 (9th Cir. 1994). At issue in *Rumsey* was

a request by various Indian tribes to negotiate regarding various "Proposed Gaming Activities" which included electronic formats of games already conducted by the state in other formats, and live banking and card games that shared characteristics with gaming the state permitted. *Rumsey Indian Rancheria of Wintun Indians v. Wilson*, 41 F.3d at 424.

The Ninth Circuit cited *Cheyenne River Sioux Tribe v. South Dakota*, 3 F.3d 273 (8th Cir. 1993) and the District Court's opinion in *this* case, holding that the "Proposed Gaming Activities" were *not* negotiable because the state did not conduct the exact game in the exact way that the Tribes wanted to conduct it.

> The fact that California allows games that share some characteristics with banked and percentage card gaming – in the form of (1) banked and percentage games other than card games and (2) nonbanked, nonpercentage card games is not evidence that the State permits the Proposed Gaming Activities. Nor is it significant that the state lottery, if not technically a slot machine, is functionally similar to one. In Cheyenne River Sioux Tribe v. South Dakota, 3 F.3d 273 (8th Cir. 1993), a tribe sought to operate a traditional form of keno as well as casino-type gambling. When the State of South Dakota refused to negotiate, the tribe filed suit, arguing that the video keno and charity-run casino-type gaming were legal in the state. The Eighth Circuit rejected his argument. First, it found that the state permitted charities to operate bingo and raffles, but not casino-type gambling. Second, it held that the state need not negotiate traditional keno if only video keno is permitted

> in South Dakota. The "such gaming" language of 25 U.S.C. § 2710(d)(1)(B) does not require the state to negotiate with respect to forms of gaming it does not presently permit. Because video keno and traditional keno are not the same and video keno is the only form of keno allowed under state law, it would be illegal . . . for the tribe to offer traditional keno to its patrons. Id. at 279. The court thus concluded that South Dakota had not failed to negotiate in good faith by refusing to negotiate over traditional keno and casino-type gaming. Accord Couer [sic] D'Alene Tribe v. Idaho, 842 F.Supp. 1268, 1280 n. 9 (D.Idaho 1994).
>
> We agree with the approach taken by the Eighth Circuit. IGRA does not require a state to negotiate over one form of a gaming activity simply because it has legalized another, albeit similar form of gaming. Instead, the statute says only that, if a state allows a gaming activity "for any purpose by any person, organization, or entity," then it also must allow Indian tribes to engage in that same activity. 25 U.S.C. § 2710(d)(1)(B). In other words, a state need only allow Indian tribes to operate games that others can operate, but need not give tribes what others cannot have.

Rumsey Indian Rancheria Wintun Indians v. Wilson, 41 F.3d 421, 426-427 (9th Cir. 1994).[13]

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[13] The original *Rumsey* decision has been quoted at length because of the way the Ninth Circuit summarily disposed of this case below relying on that *Rumsey* decision. The wording of this passage has been slightly modified in the more recent *Rumsey* decision, but the reasoning and result are the same.

In *Rumsey, supra,* the Ninth Circuit went on to explain (1) why IGRA was unambiguous, making it unnecessary to look to the legislative history, (2) why the word "permits" had a different meaning in the Class III provision of 25 U.S.C. 2710(d)(1) than it did in the Class II provision of 25 U.S.C. 2710(b)(1) and (3) why the Second Circuit in *Mashantucket Pequot* was wrong in its analytical approach, though not in result. *Rumsey Indian Rancheria Wintun Indians v. Wilson,* 41 F.3d 421 (9th Cir. 1994).

There are now three Circuits (Second, Fifth and Seventh) which use the broad "civil regulatory/criminal prohibitory" approach for Class III gaming. Two other Circuits (Eighth and Ninth) use the broad "civil regulatory/criminal prohibitory" approach for Class II gaming, but the narrow "specific state game" approach for Class III gaming.

There exists a clear conflict between the Circuits regarding this important federal question. S.Ct. Rule 10(a), (c). It is appropriate that this conflict be resolved by granting this Writ.

C. Conflicting Approaches Applied to this Case

The impact of the conflict between the Circuits is readily apparent when the differing analytical approaches are applied to the State's two gaming schemes in this case.[14] If the broad "civil regulatory/criminal prohibitory" approach of the Second, Fifth and

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[14] A detailed explanation of the State's two gaming schemes is set out above in Statement of the Case at pp. 5-8 and will not be repeated here.

Seventh Circuits is used, then *all* Class III gaming is negotiable. If the narrow "specific state game" approach of the Eighth and Ninth Circuits is used, then no additional gaming is negotiable. Under the latter approach the present Compact contains all gaming which could have been negotiable.

All Class III gaming is negotiable when the Second, Fifth and Seventh Circuit's broad "civil regulatory/criminal prohibitory" approach is applied to the State's *original* scheme because (1) all lotteries are permitted if conducted by the State Lottery Commission which is statutorily exempted, I.C. 67-7447, from State statutes which otherwise restrict lotteries such as slot machines, (2) parimutuel betting is permitted without specific prohibition and (3) charitable games of chance are constitutionally permitted and not statutorily restricted.[15]

All Class III gaming is also negotiable when the Second, Fifth and Seventh Circuit's broad "civil regulatory/criminal prohibitory" approach is applicable to the state's *amended* gaming scheme because all gaming is permitted if the "prize" is "only additional play." The limitation on this one element of gaming does not alter the State's policy any more than a limitation on any other element (bet size) or the use to which gaming proceeds can be put (charitable purposes).

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[15] If the charitable game of chance constitutional provision is determined to not be self-effectuating, games of chance which are found to be not lotteries would not be negotiable if specifically prohibited in I.C. 18-3801 et seq. This is an issue to be resolved by the Courts below if the Writ is granted and the Ninth Circuit reversed.

In contrast, only the exact game played in the State would be negotiable under the Eighth and Ninth Circuit's narrow "specific state game" approach. Under both the original or amended state gaming schemes, negotiations would be limited to (1) the lotteries of the numbers game known as lotto (Powerball), pulltabs and scratch games and (2) parimutuel betting on horse, dog and mule racing. Lotteries such as slot machines would not be negotiable. Parimutuel betting on the racing of other animals such as donkeys would not be negotiable.[16]

The vastly different results from application of the Circuits' conflicting approaches are not unique to this case or this State's specific gaming schemes. A similar result would follow from almost any state's gaming scheme because each state scheme will allow some gaming and then place some limits. The question presented in this case has true national application.

A final point is that this case addresses only what is *negotiable*. In most every negotiation the number of items negotiated is much larger than the items agreed upon. Just because a particular game is negotiable does not mean it will be agreed upon in the Compact. As the Second Circuit noted, limiting the negotiations to the limits of state law would render meaningless the entire compacting process because " . . . there would be nothing to negotiate . . . " *Mashantucket Pequot Tribe v. Connecticut*, 913 F.2d at 1031.

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[16] A male donkey, when bred with a female horse, produces the sterile mule.

For the Class III compacting process to be meaningful, and for tribes to realize the economic development potential that Congress intended, the Eighth and Ninth Circuits narrow "specific state game" approach must be rejected in favor of the Second, Fifth and Seventh Circuits broad "civil regulatory/criminal prohibitory" approach.[17]

CONCLUSION

The Question Presented of what gaming is negotiable in an IGRA Class III gaming compact is certainly an important federal question. Like all Indian issues, Indian gaming is a federal matter. It is controlled by a federal statute. Indian gaming is a contentious issue between tribes and states which needs to be resolved.

The Circuits are divided on how the federal law should be interpreted and applied. The result has been that Indian tribes in some parts of the country are reaping

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[17] If the Writ is granted, an additional analytical approach, which was raised and rejected below, will also be discussed. It is the analytical approach employed in the dissent to the rejection to hear *Rumsey en banc*. It arises directly from the operable Class III statutory language of "*Class III gaming* activities shall be lawful on Indian lands only if such activities are . . . located in a state that permits *such gaming* for any purpose by any person, organization, or entity . . . " 25 U.S.C. 2710(d)(1) (emphasis added). The antecedent of "such gaming" is "Class III gaming." When the antecedent "Class III gaming" is substituted for "such gaming," the statute requires a state to negotiate *all* types of Class III gaming if it permits *any* Class III gaming. This analysis certainly seems to be the correct reading of the statute on its face.

the sizable economic rewards of gaming revenues, while Indian tribes in other parts of the country are unable to realize the same sort of economic prosperity. These differing results are based solely on the different way the various Circuits are interpreting and applying federal law. This is not right.

This important federal question is squarely and clearly presented in this case. It is not fact bound or limited by unique issues. The Circuits are divided. It is appropriate to grant this Petition for Writ of Certiorari.

RAYMOND C. GIVENS*
GIVENS, FUNKE & WORK
424 Sherman Avenue, Suite 308
Coeur d'Alene, Idaho 83814
(208) 667-5486

Attorneys for Petitioner

*Counsel of Record

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

COEUR D'ALENE TRIBE, *Plaintiff-Appellant,* and KOOTENAI TRIBE OF IDAHO; NEZ PERCE TRIBE, *Plaintiffs,* v. STATE OF IDAHO, *Defendant-Appellee.*	No. 94-35238 D.C. No. CV-92-00437-HLR ORDER

Appeal from the United States District Court
for the District of Idaho
Harold L. Ryan, District Judge, Presiding

Argued and Submitted
March 9, 1995 – Seattle, Washington

Filed April 6, 1995

Before: Harry Pregerson, Alex Kozinski,
and Edward Leavy, Circuit Judges.

COUNSEL

Raymond C. Givens, Givens, Funke & Work, Coeur d'Alene, Idaho, for the plaintiff-appellant.

David G. High, Deputy Attorney General, Boise, Idaho, for the defendant-appellee.

ORDER

The judgment of the district court is affirmed substantially for the reasoning advanced in its published opinion, 842 F.Supp. 1268 (Idaho 1994). Our affirmation also is based, in part, on our holding in *Rumsey Indian Rancheria of Wintun Indians v. Wilson*, 41 F.3d 421 (9th Cir. 1994).

In *Rumsey*, we held that the Indian Gaming Regulatory act, 25 U.S.C. § 2710(d)(1)(B), permits Class III gaming activities on Indian lands "only if such activities are . . . located in a State that permits such gaming for any purpose. . . . " *Id.* at 425. Thus, we conclude that where a state does not permit gaming activities sought by a tribe, "the tribe has no right to engage in those activities, and the state . . . has no duty to negotiate with respect to them." *Id.* In so concluding, we cited with approval Judge Ryan's well-reasoned opinion in the instant case. *Id.* at 427.

Because Idaho does not permit Class III gaming activities, we hold that the Coeur D'Alene Tribe has no right to engage in those activities.

AFFIRMED.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

COEUR D'ALENE TRIBE, Plaintiff-Appellant, HLR and KOOTENAI TRIBE OF IDAHO; NEZ PERCE TRIBE, Plaintiffs, vs. STATE OF IDAHO, Defendant-Appellee.	)	No. 94-35238 D.C. No. CV-92-00437- ORDER (Filed May 19, 1995)

Before: PREGERSON, KOZINSKI, and LEAVY, Circuit Judges.

The panel as constituted in the above case has voted unanimously to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for a rehearing en banc and no judge of the court has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

COEUR D'ALENE TRIBE, KOOTENAI TRIBE OF IDAHO, and NEZ PERCE TRIBE, Plaintiffs, v. STATE OF IDAHO, Defendant.	CIVIL NO. 92-0437-N-HLR DECLARATORY JUDGMENT (Filed Jan. 27, 1994)

Based on the findings and conclusions set forth in the Order on Cross-Motions for Summary Judgment entered on January 27, 1994, the court hereby enters the following DECLARATORY JUDGMENT:

1. The Supreme Court case of *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987), and the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701, *et seq.* ("IGRA"), clearly restrict gaming on Indian lands to those types of games permitted by the state and/or those games which do not violate the law and public policy of the state.

2. The present law in Idaho, including the 1992 constitutional amendment, controls the court's analysis of what gaming is permitted by Idaho and what gaming is against the law and the public policy of the State.

3. The legislative history and case law establish that IGRA allows the State to negotiate with the Tribes with respect to such issues as wage and pot limits, days and hours of operation, and capacity of proposed gaming

facilities. Furthermore, it is clear that a focal point of compact negotiations is the question of the extent to which state regulations and/or a state regulatory system regarding particular gaming activities shall apply on Indian reservations.

4. Under the clear dictates of IGRA, the State cannot operate its lottery on tribal lands without appropriate compacts and tribal ordinances authorizing such Class III gaming by this non-tribal entity.

5. The State is only obligated to negotiate a compact with the Tribes regarding Class III games which are permitted and/or are not prohibited by the laws and public policy of the State. Neither the language of IGRA, the *Cabazon* case on which it is based, the legislative history and statement of purpose of the Act, nor the later federal cases interpreting the Act, can be read to allow the Tribes to conduct casino-type gaming on reservations in Idaho, when the laws and public policy of Idaho are so clearly against such gaming. The State is required to negotiate only as to those Class III gaming activities permitted under state law: a lottery and pari-mutual betting on horse, mule, and dog races.

DATED this 27th day of January, 1994.

/s/ Harold L. Ryan
HAROLD L. RYAN
SENIOR UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

COEUR D/ALENE TRIBE, KOOTENAI TRIBE OF IDAHO, and NEZ PERCE TRIBE, Plaintiffs, v. STATE OF IDAHO, Defendant.	CIVIL NO. 92-0437-N-HLR ORDER ON CROSS-MOTIONS FOR SUMMARY JUDGMENT (Filed Jan. 27, 1994)

I. FACTS AND PROCEDURE

Plaintiffs in the above-entitled action, the Coeur d'Alene, Nex Perce, and Kootenai Indian tribes ("the Tribes") are federally-recognized Indian tribes having tribal lands within the State of Idaho. Defendant in this matter is the State of Idaho ("the State" or "Idaho"). The Tribes and the State seek a declaratory judgment regarding their respective rights and obligations under the Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701, *et seq.* ("IGRA"). The case has been submitted to the court for disposition on cross-motions for summary judgment. These motions have been fully briefed and a hearing was held on December 16, 1993.

Briefly, the facts of the case are as follows.[1] Since 1989, Idaho has operated a state lottery as a means of raising funds for public buildings and schools. The State

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[1] The following summary of the facts is based on the statements of undisputed facts submitted by the parties, and on certain undisputed facts gleaned from the record.

also licenses and regulates pari-mutuel betting on horse, mule, and dog races pursuant to state law. The present dispute between the Tribes and the State arises over the extent and types of gaming activities which the Tribes may conduct on their respective reservations. Economic conditions on the reservations are such that tribal leaders seek additional governmental revenue and employment for tribal members through Class III gaming.[2]

Pursuant to 25 U.S.C. § 2710(d)(3), the Coeur d'Alene Tribe asked the state on April 15, 1992, to enter into negotiations for the purpose of entering into a tribal-state compact governing Class III gaming activities on the Coeur d'Alene Reservation. The Kootenai and Nez Perce Tribes requested such negotiations with the State on June 8, 1992, and July 22, 1992, respectively. During the summer of 1992, Idaho called a special session of its legislature, enacted legislation, and drafted a proposed constitutional amendment changing Idaho law regarding gaming. The Tribes contend that these actions were taken to prevent them from conducting certain Class III gaming activities on their reservations.

Prior to 1988, Article III, Section 20 of the Idaho Constitution provided as follows: "The legislature shall not authorize any lottery or gift enterprise under any pretense or for any purpose whatever." Idaho Const. art. III, § 20 (amended 1988 and 1992). This provision was in effect until the late 1980s when certain groups within the State pushed for a change in Idaho law so that the State

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[2] As discussed more fully below, IGRA divides gaming into three categories: Class I, Class II, and Class III. *See* 25 U.S.C. § 2703(6), -(7) and -(8).

could operate a lottery. This movement culminated in 1988, when Idaho voters passed an amendment to Section 20. The 1988 amended version of Article III, Section 20 provided as follows:

> Gambling not to be authorized. – No game of chance, lottery, gift enterprise or gambling shall be authorized under any pretense or for any purpose whatever, except for the following:
>
> a. A state lottery which is authorized by the state if conducted in conformity with law; and
>
> b. Pari-mutuel betting if conducted in conformity with law; and
>
> c. Charitable games of chance which are operated by qualified charitable organizations in the pursuit of charitable purposes if conducted in conformity with law.

Idaho Const. art. III, § 20 (amended 1992). This provision was again amended by the voters of Idaho in November of 1992. Thus, the provision now reads as follows:

> Gambling Prohibited. – (1) Gambling is contrary to public policy and is strictly prohibited except for the following:
>
> a. A state lottery which is authorized by the state if conducted in conformity with enabling legislation; and
>
> b. Pari-mutuel betting if conducted in conformity with enabling legislation; and
>
> c. Bingo and raffle games that are operated by qualified charitable organizations in the pursuit of charitable purposes if conducted in conformity with enabling legislation.

> (2) No activities permitted by subsection (1) shall employ any form of casino gambling including, but not limited to, blackjack, craps, roulette, poker, bacarrat [baccarat], keno and slot machines, or employ any electronic or electromechanical imitation or simulation of any form of casino gambling.
>
> (3) The legislature shall provide by law penalties for violations of this section.

Idaho Const. art. III, § 20(1)-(3).

The Idaho criminal statutes regarding gambling were also changed in 1992. Former Idaho Code § 18-3801 provided as follows:

> 18-3801. Gambling. – Every person who deals, plays or carries on, opens or causes to be opened, or who conducts, either as owner, employee, or lessee, whether for hire or not, any game of faro, monte, roulette, lansquenet, rouge et noir, rondo, Indian stick game, or any game played with cards, dice or any other device for money, checks, credit or any other representative of values, is guilty of a misdemeanor and is punishable by fine not less than $200 nor more than $1,000 or imprisonment in the county jail not less than two (2) months nor more than twelve (12) months or both such fine and imprisonment.

Idaho Code § 18-3801 (1972) (amended 1992).

Idaho code §§ 18-3801 and -3802 now provide as follows:

> 18-3801. Gambling defined. – "Gambling" means risking any money, credit, deposit or other thing of value for gain contingent in

whole or in part upon lot, chance, the operation of a gambling device or the happening or outcome of an event, including a sporting event, the operation of casino gambling including, but not limited to, blackjack, craps, roulette, poker, bacarrat [baccarat] or keno, but does not include:

(1) Bona fide contests of skill, speed, strength or endurance in which awards are made only to entrants or the owners of entrants; or

(2) Bona fide business transactions which are valid under the law of contracts; or

(3) Games that award only additional play; or

(4) Merchant promotional contests and drawings conducted incidentally to bona fide nongaming business operations, if prizes are awarded without consideration being charged to participants; or

(5) Other acts or transactions now or hereafter expressly authorized by law.

18-3802. Gambling prohibited. – (1) A person is guilty of gambling if he:

(a) Participates in gambling; or

(b) Knowingly permits any gambling to be played, conducted or dealt upon or in any real or personal property owned, rented, or under the control of the actor, whether in whole or in part.

(2) Gambling is a misdemeanor.

Idaho Code §§ 18-3801 and 18-3802 (Supp. 1993).

After the voters passed the final amendment to Article III, Section 20 on November 3, 1992, the Nez Perce Tribe brought suit challenging that amendment on the grounds that the State failed to set forth an adequate and truthful statement of the purpose of the proposed amendment on the ballot as required under Idaho law. In a recent decision, the Idaho Supreme Court upheld the amendment, declaring that the statement of purpose placed on the ballot was sufficient and that the amendment was properly presented for voter approval on the November 3, 1992, election ballot. *See Nez Perce Tribe v. Cenarrusa,* No. 20281, 1993 WL 390410 (Idaho Oct. 5, 1993).

After numerous negotiation sessions, the Coeur d'Alene Tribe and the State entered into a partial compact in December of 1992, covering all matters which could be agreed upon. No compacts have been entered into between the State and the Kootenai and Nez Perce Tribes. The present suit was filed because negotiations between the State and all three Tribes have reached an impasse regarding Class III gaming. The Tribes have expressed their intent to engage in extensive Class III gaming activities, including casino-style gambling, which the State contends are prohibited under Idaho law and public policy. Since negotiations began, the State has taken the position that it is only required to negotiate Class III activities permitted under Idaho law. Thus, the State has agreed to negotiate only as to a lottery and pari-mutuel betting on horse, mule, and dog races.

Each of the Tribes has filed a separate complaint in the action, but they have filed a joint motion for summary

judgment supported by joint memoranda. In their complaints, the Tribes claim that the State has violated IGRA by refusing to negotiate Class III games, by attempting to prevent the Tribes from conducting Class III games, by attempting to impose restrictions on Indian gaming greater than those imposed upon its own lottery and racing commissions, and by attempting to give retroactive effect to changes in state law made after the requests for negotiations were made by the Tribes. The Tribes also allege that the State cannot conduct its lottery on reservation lands without a tribal ordinance or resolution and a tribal-state compact authorizing the State to do so.

The court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1362.[3] The State has consented to this suit and has waived any objection to jurisdiction based on immunity from suit under the Eleventh Amendment to the United States Constitution. In addition, the dispute between the parties arising from the negotiation of gaming compacts is an actual controversy warranting declaratory relief. *See Oneida Tribe of Indians v. Wisconsin*, 951 F.2d 757, 759 (7th Cir. 1991).

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[3] Title 28 U.S.C. § 1362 provides that "[t]he district courts shall have original jurisdiction of all civil actions brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States." 28 U.S.C.S. § 1362 (Law. Co-op. 1988). It is undisputed that the Tribes are federally recognized Indian tribes within the meaning of IGRA. *See* 25 U.S.C. § 2703(5).

II. ANALYSIS

A. The Summary Judgment Standard

Motions for summary judgment are governed by Rule 56 of the Federal Rules of Civil Procedure. Rule 56 provides, in pertinent part, that judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c).

The Supreme Court has made it clear that under Rule 56 summary judgment is mandated if the non-moving party fails to make a showing sufficient to establish the existence of an element which is essential to his case and upon which he will bear the burden of proof at trial. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). If the nonmoving party fails to make such a showing on any essential element of his case, "there can be no 'genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." *Id.* at 323.[4]

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[4] *See also* Rule 56(e), which provides in part:

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if

Moreover, under Rule 56, it is clear that an issue, in order to preclude entry of summary judgment, must be *both* "material" and "genuine." An issue is "material" if it affects the outcome of the litigation. An issue, before it may be considered "genuine," must be established by "sufficient evidence supporting the claimed factual dispute . . . to require a jury or judge to resolve the parties' differing versions of the truth at trial." *Hahn v. Sargent*, 523 F.2d 461, 464 (1st Cir. 1975) (*Quoting First Nat'l Bank v. Cities Serv. Co., Inc.*, 391 U.S. 253, 289 (1968)). The Ninth Circuit cases are in accord. *See e.g., British Motor Car Distrib. v. San Francisco Automotive Indus. Welfare Fund*, 882 F.2d 371 (9th Cir. 1989).

According to the Ninth Circuit, in order to withstand a motion for summary judgment, a party

> (1) must make a showing sufficient to establish a genuine issue of fact with respect to any element for which it bears the burden of proof; (2) must show that there is an issue that may reasonably be resolved in favor of either party; and (3) must come forward with more persuasive evidence than would otherwise be necessary when the factual context makes the non-moving party's claim implausible.

Id. at 374 (citation omitted).

The parties agree that there are no disputed issues of material fact and that this matter may be resolved by summary judgment.

> appropriate, shall be entered against the adverse party.

Fed R. Civ. P. 56(e).

B. Pending Motions for Summary Judgment

1. Issues.

Resolution of this dispute turns on the following issue: The Tribes contend that because Idaho permits and/or does not prohibit certain forms of Class III gaming, the Tribes are free to conduct any and all forms of Class III gaming, including casino gambling, on their reservations. Idaho contends that the Tribes may conduct only those specific forms of Class III gaming which are permitted and/or are not prohibited under the law and public policy of the State.

The Tribes have asked the court to enter a declaratory judgment as to the following specific issues:

1. Does IGRA impose any restriction on the type of Class III gaming the Tribes may conduct in light of Idaho's gaming scheme?

2. In examining the Idaho gaming scheme under IGRA, should the court use the present Idaho gaming scheme or the scheme in effect in April 1992 when the IGRA gaming compact negotiations were initiated?

3. Under IGRA can a state insist upon restrictions which limit the opportunity for the economic self-sufficiency of a Tribe?

4. Under IGRA can a state conduct its own lottery on Indian lands without a compact with that Tribe?

See Mem. Supp. Pls.' Mot. for Summ. J., filed June 25, 1994, at 1.

2. Introduction to IGRA and Indian Gaming.

When Congress enacted IGRA in 1988, it made the following findings:

> (1) numerous Indian tribes have become engaged in or have licensed gaming activities on Indian lands as a means of generating tribal governmental revenue;
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> . . . .
>
> (3) existing Federal law does not provide clear standards or regulations for the conduct of gaming on Indian lands;
>
> (4) a principal goal of Federal Indian policy is to promote tribal economic development, tribal self-sufficiency, and strong tribal government; and
>
> (5) Indian tribes have the exclusive right to regulate gaming activity on Indian lands if the gaming activity is not specifically prohibited by Federal law and *is conducted within a State which does not, as a matter of criminal law and public policy, prohibit such gaming activity.*

25 U.S.C.S. § 2701 (Law. Co-op. 1983 & Supp. 1993) (emphasis added).[5]

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[5] After setting forth the preceding findings, Congress then explained the purposes of IGRA:

> (1) to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments;
>
> (2) to provide a statutory basis for the regulation of gaming by an Indian tribe adequate to shield it from

IGRA divides gaming into three categories. Class I includes "social games solely for prizes of minimal value or traditional forms of Indian gaming engaged in by individuals as a part of, or in connection with, tribal ceremonies or celebrations." *Id.* § 2703(6). Class I gaming is under the exclusive jurisdiction of Indian tribes and is not subject to the regulatory provisions of IGRA. 25 U.S.C. § 2710(a)(1).

Class II gaming is defined as

> the game of chance commonly known as bingo (whether or not electronic, computer, or other technologic aids are used in connection therewith) . . . including, (if played in the same location) pull tabs, lotto, punch boards, tip jars, instant bingo, and other games similar to bingo, and . . . card games that (I) are explicitly authorized by the laws of the State, or (II) are not explicitly prohibited by the laws of the State and are played at any location in the State, but only if such card games are played in conformity with those laws and regulations (if any) of the State regarding hours or periods of operation of such card games or limitations on wagers or pot sizes in such card games.

25 U.S.C.S. § 2703(7)(A)(i)(III), -(ii) (Law. Co-op. 1983 & Supp. 1993). Class II gaming does not include "any banking card games, including baccarat, chemin de fer, or

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> organized crime and other corrupting influences, to ensure that the Indian tribe is the primary beneficiary of the gaming operation, and to assure that gaming is conducted fairly and honestly by both the operator and players. . . .

25 U.S.C.S. § 2702 (Law. Co-op. 1983 & Supp. 1993).

blackjack (21), or . . . electronic or electromechanical facsimiles of any game of chance or slot machines of any kind." *Id.* § 2703(7)(B). Indian tribes have jurisdiction over Class II gaming, subject to the requirements of IGRA and the oversight of the National Indian Gaming Commission. 25 U.S.C. § 2710(b).

Class III gaming includes all forms of gaming that are not Class I or Class II gaming. 25 U.S.C. § 2703(8). Only Class III gaming is at issue in this case. Although the Tribes have not listed the specific games they wish to conduct, they have made it clear that they intend to operate casinos on their reservations. Therefore, the court will assume that the Tribes intend to conduct card and dice games, baccarat, roulette, keno and slot machines, and all other traditional forms of casino gambling, or the electronic or electromechanical equivalent thereof.

With respect to Class III gaming, IGRA provides as follows:

> Class III gaming activities shall be lawful on Indian lands only if such activities are . . . authorized by [tribal] ordinance or resolution . . . located in a State that permits such gaming for any purpose by any person, organization, or entity, and . . . conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State. . . .

25 U.S.C.S. § 2710(d)(1) (Law. Co-op. 1983 & Supp. 1993). IGRA requires that, prior to engaging in Class III gaming, a compact covering such gaming must be negotiated and agreed upon by the Indian tribe and the state in which the tribal lands are located. 25 U.S.C. § 2710(d)(3)(A). The

compact must then be approved by the Secretary of Interior. 25 U.S.C. § 2710(d)(3)(B).

3. Background of IGRA – The Cabazon Decision and Legislative History.

Prior to enactment of IGRA, the United States Supreme Court handed down its decision in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987). The *Cabazon* case set the standard for resolving disputes between Indian tribes and states regarding gaming on tribal lands. In *Cabazon*, California sought to impose state restrictions on the Indian tribes' bingo operations and to prohibit the playing of draw poker and other card games on the reservation. *Id.* at 205-06. The tribes brought suit seeking a declaratory judgment that the state had no authority to apply its gaming laws inside the reservation.

In its decision, the Supreme Court first noted that Indian tribes retain the attributes of sovereignty over their members and lands. *Id.* at 207. Such sovereignty is subordinate only to the federal government and not to the states. *Id.* The Court then explained that if Congress expressly provides, state laws can be applied on reservations. California argued that Congress had done just that in Public Law 280, enacted in 1953, 67 Stat. 588 (codified as amended at 18 U.S.C. § 1162 (1970) and 28 U.S.C. § 1360 (1984)). The Court disagreed, pointing out that while Public Law 280 granted broad criminal jurisdiction over offenses committed by or against Indians within the reservations, the statute's grant of civil jurisdiction was much more limited. *California v. Cabazon Band of Mission Indians*, 480 U.S. at 207. The Court noted that in *Bryan v.*

Itasca County, 426 U.S. 373 (1976), it had held that while Public Law 280 granted states jurisdiction over private civil litigation involving reservation Indians in state court, it did not convey general civil regulatory authority. *Cabazon*, 480 U.S. at 208. The Court then declared:

> We recognized [in *Bryan*] that a grant to States of general civil regulatory power over Indian reservations would result in the destruction of tribal institutions and values. Accordingly, when a State seeks to enforce a law within an Indian reservation under the authority of Pub L 280, it must be determined whether the law is criminal in nature, and thus fully applicable to the reservation . . . or civil in nature, and applicable only as it may be relevant to private civil litigation in state court.

Id.

The Court then noted the distinction between state "criminal/prohibitory" laws and state "civil/regulatory" laws, describing the distinction as follows:

> [I]f the intent of a state law is generally to prohibit certain conduct, it falls within Pub L 280's grant of criminal jurisdiction, but if the state law generally permits the conduct at issue, subject to regulation, it must be classified as civil/regulatory and Pub L 280 does not authorize its enforcement on an Indian reservation. *The shorthand test is whether the conduct at issue violates the State's public policy.*

Id. at 209 (emphasis added). The Court also declared that although "an otherwise regulatory law is enforceable by criminal as well as civil means does not necessarily convert it to a criminal law. . . . " *Id.* at 211.

The Supreme Court then carefully reviewed California gambling laws and concluded that "Caliafornia [sic] regulates rather than prohibits gambling in general and bingo in particular." *Id.* The Court ultimately held that because California only regulated non-Indian bingo and card-playing operations, the tribes were free to engage in those particular gaming activities and were not required to adhere to state regulations regarding such activities.

The *Cabazon* decision is noted in the legislative history of IGRA and is incorporated in the final statutory language of the Act. The Senate Report discussing the requirement that Class II gaming on Indian lands be allowed only if "located within a State that permits such gaming for any purpose by any person, organization or entity," 25 U.S.C.S. § 2710(b)(1)(A) (Law. Co-op. 1983 & Supp. 1993), refers expressly to the *Cabazon* decision.

> [T]he Committee anticipates that Federal courts will rely on the distinction between State criminal laws which prohibit certain activities and the civil laws of a State which impose a regulatory scheme upon those activities to determine whether class II games are allowed in certain States. This distinction has been discussed by the Federal courts many times, most recently and notably by the Supreme Court in *Cabazon.*
>
> * * * *
>
> The phrase "for any purpose by any person, organization or entity" makes no distinction between State laws that allow class II gaming for charitable, commercial, or governmental purposes, or the nature of the entity conducting the gaming. *If such gaming is not criminally prohibited by the State in which tribes are located, then*

> *tribes, as governments, are free to engage in such gaming.*

See Mem. Supp. Pls.' Mot for Summ. J., filed June 25, 1993, App. Part I, Ex. A2 (S. Rep. No. 446, 100th Cong., 2d Sess.) at A-6 and A-12. (emphasis added).[6]

The *Cabazon* decision does not address the situation confronting the court in the present action. Nevertheless, it is clear that the prohibitory/regulatory analysis contained in *Cabazon* must guide the court in resolving this dispute. Therefore, the court must evaluate Idaho law and public policy on gambling.

4. Which Idaho Law Applies?

The Tribes argue that the court must assess Idaho law and public policy as it was in the spring and summer of 1992, when the Tribes first requested negotiations on Class III gaming. The State contends that the laws not in effect should govern the compact negotiations. The Tribes base their argument on the following grounds: (1) IGRA does not allow a state to restrict Indian gaming by modifying its laws; (2) retroactive application of changes in state law cannot be allowed to deprive the Tribes of

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[6] Although the Senate Report addresses the phrase found in 25 U.S.C. § 2710(b)(1)(A), the identical phrase is used in Section 2710(d)(1)(B), and therefore, also applies to Class III gaming. *See Mashantucket Pequot Tribe v. Connecticut*, 913 F.2d 1024, 1030 (2d Cir. 1990). "It is a settled principle of statutory construction that '[w]hen the same word or phrase is used in the same section of an act more than once, and the meaning is clear as used in one place, it will be construed to have the same meaning in the next place.' " *Id.* (citations omitted).

vested rights; and (3) the constitutional amendment ratified by the voters in 1992 is invalid because it was not adopted in accordance with Idaho law. The court need not address this third point because the Idaho Supreme Court has now upheld the amendment, and this court will defer to the findings and judgment of the Idaho Supreme Court as to the legality of the 1992 amendment process.

The Tribes contend that "Congress, in enacting IGRA, did not grant states authority to restrict Indian gaming by modifying [their] laws." Mem. Supp. Pls.' Mot. for Summ. J., filed June 25, 1993, at 27. The Tribes offer no authority to support their claim that IGRA precludes a state from changing its gaming laws prior to entering into a compact. IGRA is entirely silent on this issue. It appears that the basis of Tribes' argument is their feeling that the State has acted in an unfair and underhanded manner in changing its laws in the summer and fall of 1992.

The Tribes contend that they have been singled out for unfair treatment. The court does not agree. The 1992 changes in Idaho law apply equally to the State, to the Tribes, and to all other groups and individuals. The changes were made to make clear that only a lottery, parimutuel betting, and bingo and raffle games are permitted in Idaho. All other forms of gambling are expressly prohibited to everyone, including both the State and the Tribes. It would be a much different question if Idaho had attempted to create a situation in which the State alone could engage in casino gambling and all other groups, including Indian tribes, could not. However, this is not the case. In fact, such a situation could never occur.

Under IGRA, if the State were to engage in casino gambling, or permit any group or entity to do so, the Tribes could also engage in casino gambling. *See* 25 U.S.C. § 2710(d)(1)(B).

Under IGRA, the law and public policy of the state set the scope of permissible Class III gaming on tribal lands. IGRA certainly does not command that a state may not change its gaming laws or amend its constitution prior to entering into a compact. There is nothing in IGRA which would prevent Idaho from abolishing and criminally prohibiting *all* Class III gaming entirely.

The Tribes also contend that the State could not change its gaming laws after compact negotiations were requested because to do so would deprive them of vested rights. The Tribes have not argued this point clearly, but it appears that their position is as follows. At the time the Tribes requested compact negotiations, they acquired a vested right to conduct any and all Class III gaming permitted under Idaho law at that time. Thus, the Tribes contend that to resolve this dispute under Idaho law as it now stands would mean giving retroactive effect to the 1992 changes in the law, depriving the Tribes of a vested right.[7]

The court is not persuaded that the Tribes had any vested rights with respect to particular Class III gaming

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[7] The Tribes also speak of their vested right of self-government and tie that to their right to conduct gaming subject only to the limitations of IGRA. The court certainly recognizes the right of the Tribes to self-government and to conduct their own affairs on their reservations. However, the question of what the limitations of IGRA are is at the heart of this dispute.

activities. First, as noted above, there is nothing in IGRA which precludes a state from changing its gaming laws and negotiating compacts accordingly. Second, IGRA does not provide that an Indian tribe acquires rights of any kind at the moment compact negotiations are requested. On the contrary, IGRA makes it clear that the Tribes have no right, vested or inchoate, to conduct Class III games until a compact has been negotiated with the state. *See* 25 U.S.C. § 2710(d)(1)(C). Therefore, the only time an Indian tribe could arguably claim a vested right to conduct a particular form of Class III gaming would be after a compact between the tribe and state addressing the particular form of gaming had been entered into and finally approved.

In summary, the court finds that the proper scope of compact negotiations shall be determined by looking to Idaho law and public policy as they now stand, rather than reverting to Idaho law as it was at the time the Tribes first requested compact negotiations.

5. Scope of Negotiations.

The State maintains that it is only required to negotiate with the Tribes with respect to the specific Class III gaming activities which are permitted under Idaho law. The Tribes contend that because Idaho permits some forms of Class III gaming, its policy toward Class III gaming as a class is regulatory rather than prohibitory, and therefore, the Tribes are free to engage in *all* forms of Class III gaming, including casino gambling and keno and slot machines, and the State must negotiate accordingly. In the words of counsel for the Tribes:

> Since IGRA was passed, several federal courts have ruled on the issues present in this case. They uniformly follow the *Cabazon* rule, holding that a state "permits" a gaming activity if it has a public policy promoting that gaming activity. Thus, the games "permitted" within a state for IGRA purposes need not be limited to only those games presently operated by that state.

Mem. Supp. Pls.' Mot. for Summ. J., filed June 25, 1993, at 20.

The Tribes rely primarily on four cases: *United States v. Sisseton-Wahpeton Sioux Tribe,* 897 F.2d 358 (8th Cir. 1990); *Mashantucket Pequot Tribe v. Connecticut,* 913 F.2d 1024 (2d Cir. 1991), *cert. denied,* ___ U.S. ___, 111 S.Ct. 1620, 113 L.Ed 2d 717 (1001); *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Wisconsin,* 770 F.Supp. 480 (W.D.Wis. 1991); and *Ysleta Del Sur Pueblo v. Texas,* No. P-93-CA-29 (W.D. Tex. 1993). The court has thoroughly reviewed these cases, as well as all of the other cases, both pre-IGRA and post-IGRA, which have addressed the scope of permissible gaming on Indian reservations. Upon this review, the court finds that all of the cases uniformly support the position taken by the State.

All of the courts have followed the regulatory/prohibitory distinction established by the Supreme Court in *Cabazon.* In the four cases relied on by the Tribes, the courts conducted a broad review of the laws and public policy of each state and concluded that the *specific* gaming activity at issue was permitted by the particular state.

In *United States v. Sisseton-Wahpeton Sioux Tribe,* 897 F.2d 358 (8th Cir. 1990), the Indian tribe established a

blackjack operation on its reservation in South Dakota on April 15, 1988. *Id.* at 359. The same day the tribe opened its blackjack operation, it filed a complaint in district court seeking a declaration of its legal right to run the operation. *Id.* IGRA then became effective on October 17, 1988. IGRA contains a grandfather clause which accords Class II treatment to card games already in existence at the time of enactment.[8] The Eighth Circuit Court of Appeals held that the tribe had not altered the nature and scope of its blackjack operation since May 1, 1988, and that the operation would therefore be classified as Class II gaming because of the grandfather provision. *Id.* at 363.

The Eighth Circuit then reviewed the district court's holding that the blackjack operation was unlawful, even if classified as Class II gaming, because it was not conducted in compliance with wage limits and other requirements set by South Dakota law. That case, like the case at hand, turned on the proper interpretation of the phrase "permits such gaming for any purpose by any person, organization or entity." 25 U.S.C.S. § 2710(d)(1) (Law. Co-op. 1983 & Supp. 1993). The Eighth Circuit addressed the

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[8] Notwithstanding any other provision of this paragraph, the term "class II gaming" *includes* those card games played in the State of Michigan, the State of North Dakota, *the State of South Dakota,* or the State of Washington, that were actually operated in such State by an Indian tribe *on or before May 1, 1988,* but only to the extent of the nature and scope of the card games that were actually operated by an Indian tribe in such State on or before such date. . . .

25 U.S.C.S. § 2703(7)(C) (Law. Co-op. 1983 & Supp. 1993) (emphasis added).

case by focusing on the *particular gaming activity* – blackjack. The court did not hold that the case turned on whether or not a particular *class* of gaming was permitted by the state. "[W]e believe that the legislative history reveals that Congress intended to permit a *particular gaming activity*, even if conducted in a manner inconsistent with state law, if the state merely regulated, as opposed to completely barred, *that particular gaming activity.*" *United States v. Sisseton-Wahpeton Sioux Tribe*, 897 F.2d at 365 (emphasis added).

The court went on to hold that because South Dakota permitted commercial card games, including blackjack, the Indian tribe could also conduct a blackjack operation. This decision is entirely consistent with the position advanced by Idaho in the case at hand. Idaho asks the court to focus not only whether Class III gaming as a *class* is permitted in Idaho, but rather on what *particular Class III gaming activities* are permitted under Idaho law, and compare that to the particular gaming activities sought to be conducted by the Tribes.

In *Mashantucket Pequot Tribe v. Connecticut*, 913 F.2d 1024 (2d Cir. 1991), *cert. denied*, ___ U.S. ___, 111 S.Ct. 1620, 113 L.Ed 2d 717 (1991), the Indian tribe sought to conduct casino-type gaming activities on its reservation and the state refused to negotiate a compact regarding such activities. *Id.* at 1025. The court reviewed Connecticut law and noted that Connecticut allowed non-profit charitable organizations to conduct casino gambling on so-called "Las Vegas Nights" for charitable purposes. In light of 25 U.S.C. § 2710(d)(1)(B), the court ruled that the state was required to negotiate with the tribe regarding the conduct of casino-type games of chance because the

state permitted other organizations and entities to engage in such activities. *Id.* at 1032. The state would not have had to negotiate casino-type gaming had it prohibited such gaming to *all* persons, organizations, and entities within the state.

In *Lac du Flambeau Band of Lake Superior Chippewa Indians v. Wisconsin*, 770 F.Supp. 480 (W.D.Wis. 1991) (hereafter "*Lac du Flambeau II*"), Indian tribes and the State of Wisconsin disagreed over whether the state was required to include casino games, video games, and slot machines in its negotiations with the tribes. *Id.* at 482. The state constitution was amended in 1987. As amended, the constitution authorized a state lottery and pari-mutuel betting and did not prohibit other forms of gaming involving the elements of prize, chance, and consideration. *Id.* at 486. Thus, the court concluded that "the state is required to negotiate with plaintiffs over the inclusion in a tribal-state compact of any activity that includes the elements of prize, chance and consideration and *that is not prohibited expressly by the Wisconsin Constitution or state law.*" *Id.* at 488 (emphasis added). Given the broad definition of lottery and the fact that Wisconsin law no longer had any express prohibition against games involving the elements of prize, chance, and consideration, Wisconsin was required to negotiate regarding the games proposed by the tribes.

At least one other court has noted that the court in *Lac du Flambeau II* took a more expansive view of the *Cabazon* decision than had previous courts, and declined to follow *Lac du Flambeau II*:

> To some extent, the court in *Lac du Flambeau II* utilized a different interpretation of *Cabazon*. . . . For example, the court observed:
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> > If the policy is to prohibit all forms of gambling by anyone, then the policy is characterized as criminal-prohibitory and the state's criminal laws apply to tribal gaming activity. On the other hand, if the state allows some forms of gambling, even subject to extensive regulation, its policy is deemed to be civil-regulatory and it is barred from enforcing its gambling laws on the reservation.
>
> This approach is broader than the one employed by the Supreme Court in *Cabazon* and other courts which have faced the same question and, to the extent the court in *Lac du Flambeau II* based its conclusion on that analysis, we decline to follow its lead.

Seminole Tribe of Florida v. Florida, No. 91-6756-CIV-MARCUS, Order at 15-16 (S.D.Fla. Sept. 22, 1993) (*quoting Lac du Flambeau Band of Lake Superior Chippewa Indians v. Wisconsin*, 770 F.Supp. at 485) (footnote omitted). The court in *Seminole Tribe of Florida* went on to declare that:

> [T]he thrust of *Cabazon* and its progeny requires a *particularized inquiry into the proposed gambling activity* (in this case, casino gambling and machine or computer-assisted gaming). For example, in *Cabazon*, where California ran a state lottery and permitted parimutuel betting, the lower courts and the Supreme Court looked at the state's public policy regarding bingo, *the specific gambling activity at issue*. Thus, we do not agree that *Lac du Flambeau II* dictates the outcome of the instant case, without a review of the

> State's public policy toward gambling in general and its public policy toward *the specific gaming activities in question.*

Seminole Tribe of Florida v. Florida, No. 91-6756-CIV-MARCUS, Order at 16 n.1 (S.D.Fla. Sept. 22, 1993).

This court agrees with the approach taken by the court in *Seminole Tribe of Florida.* In addition, the *Lac du Flambeau II* case is distinguishable from the case at hand because the Idaho Constitution *expressly prohibits* all forms of casino gambling and/or the electrical or electromechanical imitation or simulation of any form of casino gambling. The constitution also directs the legislature to provide criminal penalties for violation of this prohibition against such gaming.

In the final decision relied on by the Tribes, *Ysleta Del Sur Pueblo v. Texas*, No. P-93-CA-29 (W.D.Tex. Nov. 1, 1993) (Memorandum Opinion & Order), the State of Texas refused to negotiate with the plaintiff Indian tribe regarding casino-type games. The tribe sought to engage in blackjack, roulette, baccarat, craps, and slot machines, including electronic and electromechanical games of chance. *Id.* at 15. The court noted that Texas allowed bingo, pari-mutuel betting on horse and dog races, charitable raffles, the state lottery, mechanical games of chance so long as the reward is a non-cash prize of no more than $5.00, wagers on carnival contests so long as the prize is limited to merchandise worth less than $25.00, and private social gambling if conducted in private with even chances and risks and no bank. The court then held that Texas no longer had a broad public policy against gambling. *Id.* at 13.

The term "lottery" is broadly defined in Texas. *See* Tex. Rev. Stat. Ann. art. 179g, § 1.02(s) (Vernon Supp. 1992), *quoted in Ysleta Del Sur Pueblo v. Texas*, No. P-93-CA-29, (W.D.Tex. Nov. 1, 1993) Mem. Op. & Ord. at 16. Although Texas could authorize casino gambling under its broad definition of lottery, it argued that the Indian tribe could not engage in casino gambling because such gambling was not actually played or allowed in Texas. The court pointed out that the proper focus was on whether Texas permitted such gaming by any person, organization, or entity. The court agreed with the decision in *Seminole Tribe of Florida*, declaring that "just because the state allows *some types* of Class III gaming to occur the state is not required to engage in negotiations over *all types* of Class III gaming activities." *Ysleta Del Sur Pueblo v. Texas*, No. P-93-CA-29, (W.D.Tex. Nov. 1, 1993), Mem. Op. & Ord. at 17-18 (emphasis added).

The court then noted that the only restriction in Texas law as to the operation of the state lottery was that the State Lottery Act only excluded "video forms of casino games, not the live or other non-video electronic games." *Id.* at 18. The court also found that a limited form of casino-type gaming could occur under what it referred to as the "carnival exception," and that charitable organizations could also use this exception. *Id.* at 19. The court then concluded as follows:

> Because casino gaming is permitted by some persons and individuals under the carnival exception, and based on the definition of "lottery" in the Texas Lottery Act allowing games which include chance, prize, and consideration, the Court is of the opinion that the

> casino games requested by the Tribe should be included in the negotiations of a Tribal-State Compact under the IGRA.

Id. at 20.

Again, the Texas case is distinguishable from the case at hand because the Idaho Constitution expressly prohibits the state lottery commission (and all others) from employing any form of casino gambling, or from employing any form of electrical or electromechanical imitation or simulation of any form of casino gambling. In addition, there is no "carnival exception" in Idaho, nor does Idaho permit charitable "Las Vegas Nights."

The court in *Ysleta Del Sur Pueblo* concurred with the position now advanced by Idaho – that just because the State permits *some* forms of Class III gaming, does not mean that it must negotiate as to *all* forms of Class III gaming. Other recent federal court decisions also agree with this position. In *Seminole Tribe of Florida*, the court, after reviewing the same cases discussed above, held as follows:

> In sum, we can find no convincing support in these cases for the Tribe's suggestion that a state's public policy permitting individual Class III activities is somehow equivalent to permitting all Class III gaming activities. Indeed, two other courts recently reached the same conclusion regarding the 'permits such gaming' language and Class III gaming activities.

Seminole Tribe of Florida v. Florida, No. 91-6756-CIV-MARCUS, (S.D.Fla. Sept. 22, 1993) Ord. at 16.

The Florida court was referring to the decisions in *Cheyenne River Sioux Tribe v. South Dakota*, 3 F.3d 273 (8th Cir. 1993); and *Rumsey Indian Rancheria v. Wilson*, No. CIV-S-92-812-GEB (E.D.Calif. July 16, 1993). In *Cheyenne River*, the court noted that since 1989 South Dakota had allowed state lotteries, video lotteries, limited card games, pari-mutuel horse and dog racing, and simulcasting. *Cheyenne River Sioux Tribe v. South Dakota*, 3 F.3d at 276. An important part of the dispute centered around the tribe's proposal to conduct traditional keno games on its reservation. South Dakota law permitted only video keno games to be conducted. Therefore, the state refused to include traditional keno gaming in the compact negotiations. In resolving this dispute, the Eighth Circuit Court of Appeals held as follows:

> We agree with the state that it need not negotiate traditional keno if only video keno is permitted in South Dakota. The "such gaming" language of 25 U.S.C. § 2710(d)(1)(B) does not require the state to negotiate with respect to forms of gaming it does not presently permit. Because video keno and traditional keno are not the same and video keno is the only form of keno allowed under state law, it would be illegal, in addition to being unfair to the other tribes, for the tribe to offer traditional keno to its patrons. Therefore, we agree with the district court that the state did not refuse to negotiate in good faith on the tribe's operation of traditional keno.

Id. at 279.[9]

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[9] The circumstances and holding in the *Cheyenne River* case also apply to a similar dispute between Idaho and the Tribes in

Rumsey Indian Rancheria v. Wilson is also in accord with the position advanced by Idaho:

> At the outset, the court must decide whether, under the IGRA and *Cabazon* Class III games are considered collectively or individually when determining whether they are an appropriate subject of a Tribal-State compact. Plaintiffs argue that if California permits *any* Class III games to be played, all Class III games should be negotiable in a Tribal-State compact. The State contends that Class III is "less a category than a residuum" and urges an activity by activity analysis. Class III includes a wide variety of games and legislative history and prior cases demonstrate that the "activity" is not to be too narrowly defined. Courts which have applied the *Cabazon* prohibitory/regulatory distinction have conducted a broad review of the state's gaming laws but are careful to examine the specific gaming activity which has been proposed. . . . This court has found no authority for the proposition that a state's public policy construed as permitting a single Class III game must be found to permit all Class III gaming

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the present case. The Tribes argue that because the Idaho lottery uses scratch and pull-tab games with poker and/or other casino gambling themes, they should be allowed to engage in actual casino gambling, offering the same games on which the lottery tickets are based.

The court disagrees. There is a considerable difference between a lottery ticket with a poker theme and a live, banked card game at a casino. Idaho law clearly prohibits any banked or percentage card games or other forms of casino gambling from being played by any person for any purpose. However, the Tribes may certainly conduct their lotteries in the same fashion as the State.

> activities. Accordingly, this court adopts the method of review used by other courts. . . .

Rumsey Indian Rancheria v. Wilson, No. CIV-S-92-812-GEB (E.D.Calif. July 16, 1993), Ord. on Cross-Mot. for Summ. J., at 15-16 n.16 (citations omitted).

The Idaho Constitution expressly declares that all gambling is contrary to public policy and is strictly prohibited, except for three carefully limited exceptions: the state lottery, pari-mutuel betting if conducted in conformity with enabling legislation, and bingo and raffle games that are operated by qualified charitable organizations in the pursuit of charitable purposes.[10] In addition, the Idaho Constitution expressly forbids those engaging in the three carefully limited exceptions from employing any form of casino gambling including, but not limited to, blackjack, craps, roulette, poker, baccarat, keno and slot machines, or from employing any electrical or electromechanical imitation or simulation of any form of casino gambling.

The Idaho Constitution further declares that the legislature shall provide for penalties for violation of the prohibition against gambling. Accordingly, Idaho Code § 18-3801 provides that those who engage in gambling (other than participation in the three exceptions allowed under the Idaho Constitution) shall be guilty of a misdemeanor.

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[10] Once permitted under Idaho law, charitable organizations are now prohibited from conducting casino nights or any form of casino gambling.

Based on the preceding discussion, the court finds that under the combined IGRA and *Cabazon* analysis, the State must negotiate with the Tribes only as to the conduct of a lottery and pari-mutuel betting on horse, mule, and dog races. The State is not required to negotiate as to any other forms of Class III gaming.

6. Restrictions on Conduct of Tribal Gaming.

The State contends that it may negotiate reasonable restrictions and requirements regarding the conduct and operation of tribal gaming in furtherance of the public interest. The Tribes contend that IGRA prohibits the State from imposing restrictions on the scale of operations of allowable games which reduce either the revenue to the Tribes or the potential for economic development. The Tribes refer specifically to "limits on the number of gaming machines and gaming tables as well as limits on the size of prizes and bets." *See* Mem. Supp. Pls.' Mot. for Summ. J., filed June 25, 1993, App. Part II, Ex. F5 (1992 Class III Gaming Compact between the Coeur d'Alene Tribe and the State of Idaho) art. 6, ¶ 6.1.2b.

In light of the court's ruling on the scope of compact negotiations with respect to allowable forms of Class III gaming, this issue appears to be largely moot. Nevertheless, the court notes Section 2710(d)(3)(C) which addresses the subjects that may be raised in the course of compact negotiations.

> (i) the application of the criminal and civil laws and regulations of the Indian tribe or the State that are directly related to, and necessary for, the licensing and regulation of such activity;

> (ii) the allocation of criminal and civil jurisdiction between the State and the Indian tribe necessary for the enforcement of such laws and regulations;
>
> (iii) the assessment by the State of such activities in such amounts as are necessary to defray the costs of regulating such activity;
>
> (iv) taxation by the Indian tribe of such activity in amounts comparable to amounts assessed by the State for comparable activities;
>
> (v) remedies for breach of contract;
>
> (vi) standards for the operation of such activity and maintenance of the gaming facility, including licensing; and
>
> (vii) any other subjects that are directly related to the operation of gaming activities.

25 U.S.C.S. § 2710(d)(3)(C) (Law. Co-op. 1983 & Supp. 1993).

The Senate Report addressed the compact negotiation process in some detail.

> [T]here is no adequate Federal regulatory system in place for class III gaming, nor do tribes have such systems for the regulation of class III gaming currently in place. Thus a logical choice is to make use of existing State regulatory systems, although the adoption of State law is not tantamount to an accession to State jurisdiction. The use of State regulatory systems can be accomplished through negotiated compacts but this is not to say that tribal governments can have no role to play in regulation of class III gaming – many can and will.

> The terms of each compact may vary extensively depending on the type of gaming, the location, the previous relationship of the tribe and State, etc. Section 11(d)(3)(C) describes the issues that may be the subject of negotiations between a tribe and a State in reaching a compact. The Committee recognizes that subparts of each of the broad areas may be more inclusive. *For example, licensing issues under clause vi may include agreements on days and hours of operation, wage and pot limits, types of wagers, and size and capacity of the proposed facility.* A compact may allocate most or all of the jurisdictional responsibility to the tribe, to the State or to any variation in between. The Committee does not intend that compacts be used as a subterfuge for imposing State jurisdiction on tribal lands.
>
> The Committee does view the concession to any implicit tribal agreement to the application of State law for class III gaming as unique and does not consider such agreement to be precedent for any other incursion of State law onto Indian lands. Gaming by its very nature is a unique form of economic enterprise and the Committee is strongly opposed to the application of the jurisdictional elections authorized by this bill to any other economic or regulatory issue that may arise between tribes and States in the future.

See Mem. Supp. Pls.' Mot. for Summ. J., filed June 25, 1993, App. Part I, Ex. A2 (S.Rep. No. 446, 100th Cong., 2d Sess.) at A-13-14 (emphasis added).

The parties have not identified any specific restrictions which the State has attempted to negotiate in compact negotiations. Thus, there is no actual controversy for the court to resolve. Nevertheless, as the statute and Senate Report make clear, Congress intended the parties

to negotiate as to the degree and type of State regulation of, and jurisdiction over, gaming on tribal lands. In so doing, Congress recognized that the Tribes have a strong governmental interest in raising revenues to promote tribal economic development and self-sufficiency. Congress also recognized the important state interest in the safe, orderly, and honest conduct of gaming on the reservations. The court expects the parties to negotiate accordingly, "within the context of the mutual benefits that can flow to and from tribe and States." *Id.* at A-13.

7. Operation of the State Lottery on Tribal Lands.

Since 1989, the State has operated its own lottery on the Nez Perce Reservation and actively encouraged its play. As of April 1993, the state lottery had a total of 32 outlets at various locations in the Nez Perce Reservation. It is unclear from the record whether the state lottery is conducted on the Coeur d'Alene and Kootenai Reservations. The Tribes contend that the State may not conduct its lottery on the Nez Perce Reservation in the absence of a tribal ordinance or resolution and a tribal-state compact which authorizes this activity on the reservation. The State contends that 18 U.S.C. § 1166[11] makes Idaho's lottery laws applicable on Indian reservations.

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[11] "Subject to subsection (c), for purposes of Federal law, all State laws pertaining to the licensing, regulation, or prohibition of gambling, including but not limited to criminal sanctions applicable thereto, shall apply in Indian country in the same manner and to the same extent as such laws apply elsewhere in the State." 18 U.S.C.S. § 1166(a) (Law. Co-op 1979 & Supp. 1993).

Congress enacted IGRA in order to provide a framework to guide states and Indian tribes in their efforts to reach agreement both as to the extent of Class III gaming to be conducted on tribal lands and how those activities are to be conducted. The purpose of IGRA, its clear language, and its legislative history make clear that the extent to which state gaming regulations and/or regulatory systems shall apply on Indian reservations is to be carefully negotiated between these sovereign entities through the compact negotiation process.

It is obvious that the state lottery is a Class III gaming activity. IGRA expressly provides that Class III gaming activities shall be *lawful* on Indian lands *only if such activities are* (1) authorized by an ordinance or resolution of the tribe that meets the requirements of the statute and is approved by the commission chairman; (2) located in a state that permits such gaming for any purpose by any person, organization, or entity; and (3) conducted in conformance with a tribal-state compact entered into by the tribe and the state. 25 U.S.C. § 2710(d).

It is undisputed that there is no Nez Perce resolution authorizing Class III gaming on the Nez Perce Reservation, nor is there a compact between the State and the Nez Perce Tribe authorizing such gaming activity. Accordingly, the court finds that in the absence of a tribal gaming ordinance and a compact, neither the Tribe nor any non-tribal entity, including the State of Idaho, may conduct Class III gaming on the reservation.

8. Summary.

Based on the preceding discussion, the court summarizes its findings and conclusions as follows. First, *Cabazon* and IGRA clearly restrict gaming on Indian lands to those types of games permitted by the state and/or those games which do not violate the law and public policy of the state. Second, the present law in Idaho, including the 1992 constitutional amendment, controls this court's analysis of what gaming is permitted by Idaho and what gaming is against the law and the public policy of the State.

Third, the legislative history and cases establish that IGRA allows the State to negotiate with the Tribes with respect to such issues as wage and pot limits, days and hours of operation, and capacity of proposed gaming facilities. Furthermore, it is clear that a focal point of compact negotiations is the question of the extent to which state regulations and/or a state regulatory system regarding particular gaming activities shall apply on Indian reservations. It is hoped that compact negotiations will lead to the mutual advantage of both the Tribes and the State, and that the public interest and safety, as well as the honesty and integrity of the gaming activities, will be protected.

Fourth, IGRA makes it clear to this court that the State cannot operate its lottery on tribal lands without compacts and tribal ordinances authorizing Class III gaming by this non-tribal entity.

As to the fundamental issue, the court holds that the State is only obligated to negotiate a compact with the Tribes regarding Class III games which are permitted

and/or are not prohibited by the laws and public policy of the State. Neither the language of IGRA, the *Cabazon* case on which it is based, the legislative history and statement of purpose of the Act, nor the later federal cases interpreting the Act, can be read to allow the Tribes to conduct casino-type gaming on reservations in Idaho, when the laws and public policy of Idaho are so clearly against such gaming. The State is required to negotiate only as to those Class III gaming activities permitted under state law; a lottery and pari-mutuel betting on horse, mule, and dog races.

The Tribes have expressed their feeling that Idaho seeks to protect its gaming while restricting gaming by the Tribes. This is not the case. The Tribes will be free to conduct the same gaming activities (lottery and pari-mutuel betting) and in the same manner as the State. Furthermore, the Tribes themselves have clearly demonstrated to the Court the substantial revenues that can be generated through a lottery such as that run by the State.

C. Motion to Strike

On July 9, 1993, the State filed a Motion to Strike Affidavit of William Thompson. This motion is made on the grounds that the affidavit of Mr. Thompson sets forth legal conclusions regarding the key questions of law raised in this case. The court has reviewed this motion and the memoranda filed by the parties. The court concurs that the affidavit contains improper legal conclusions. The Tribes concede this point, and in their response memorandum they have identified each legal conclusion. Accordingly, the affidavit will be stricken to the extent that it contains legal conclusions.

III. ORDER

Based on the foregoing, and the court being fully advised in the premises,

IT IS HEREBY ORDERED that the Motion for Summary Judgment, filed June 25, 1993, by the Coeur d'Alene, Nez Perce, and Kootenai Indian Tribes, should be, and is hereby, GRANTED in part, and DENIED in part. The motion is granted in that the State of Idaho may not operate its lottery on the Nez Perce Reservation in the absence of an appropriate tribal-state compact and tribal ordinance. The motion is denied in all other respects.

IT IS FURTHER ORDERED that Defendant's Motion for Summary Judgment, filed June 25, 1993, by the State of Idaho, should be, and is hereby, GRANTED in part, and DENIED in part. The motion is denied in that the State may not operate its lottery on the Nez Perce Reservation in the absence of an appropriate tribal-state compact and tribal ordinance. The motion is granted in all other respects.

IT IS FURTHER ORDERED that, in addition to the summary of the court's findings and conclusions set forth above, the court hereby specifically DECLARES that the State of Idaho is required to negotiate with the plaintiff Tribes only as to those Class III gaming activities permitted under state law: a lottery and pari-mutuel betting on horse, mule, and dog races. Idaho law and public policy clearly prohibit all other forms of Class III gaming, including the casino gambling activities which the Tribes have sought to include in compact negotiations with the State. The Indian Gaming Regulatory Act does not require that all forms of Class III gaming be included in

compact negotiations simply because the State permits a lottery and pari-mutuel betting.

IT IS FURTHER ORDERED that the Motion to Strike Affidavit of William Thompson, filed by the State of Idaho on July 9, 1993, should be, and is hereby, GRANTED in part and DENIED in part. The motion is granted in that all legal conclusions contained in the affidavit are hereby STRICKEN. The motion is otherwise denied.

DATED this 27th day of January, 1994.

/s/ Harold L. Ryan
HAROLD L. RYAN
SENIOR UNITED STATES
DISTRICT JUDGE

U.S. Constitution, Article 1, Sec. 8, Clause 3.

> Congress shall have the power . . . to regulate commerce with foreign nations, and among the several states, and with the Indian tribes.

25 U.S.C. § 2701. Congressional findings

The Congress finds that –

(1) numerous Indian tribes have become engaged in or have licensed gaming activities on Indian lands as a means of generating tribal governmental revenue;

(2) Federal courts have held that section 81 of this title requires secretarial review of management contracts dealing with Indian gaming, but does not provide standards for approval of such contracts;

(3) existing Federal law does not provide clear standards or regulations for the conduct of gaming on Indian lands;

(4) a principal goal of Federal Indian policy is to promote tribal economic development, tribal self-sufficiency, and strong tribal government; and

(5) Indian tribes have the exclusive right to regulate gaming activity on Indian lands if the gaming activity is not specifically prohibited by Federal law and is conducted within a State which does not, as a matter of criminal law and public policy prohibit such gaming activity.

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25 U.S.C. § 2702. Congressional declaration of policy

The purpose of this chapter is –

(1) to provide a statutory basis for the operation of gaming by Indian tribes as a means

of promoting tribal economic development, self-sufficiency, and strong tribal governments;

(2) to provide a statutory basis for the regulation of gaming by an Indian tribe adequate to shield it from organized crime and other corrupting influences, to ensure that the Indian tribe is the primary beneficiary of the gaming operation, and to assure that gaming is conducted fairly and honestly by both the operator and players; and

(3) to declare that the establishment of independent Federal regulatory authority for gaming on Indian lands, the establishment of Federal standards for gaming on Indian lands, and the establishment of a National Indian Gaming Commission are necessary to meet congressional concerns regarding gaming and to protect such gaming as a means of generating tribal revenue.

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25 U.S.C. § 2703. Definitions

For purposes of this chapter –

(7)(A) The term "class II gaming" means –

(i) the game of chance commonly known as bingo (whether or not electronic, computer, or other technologic aids are used in connection therewith) –

(I) which is played for prizes, including monetary prizes, with cards bearing numbers or other designations,

(II) in which the holder of the card covers such numbers or designations when objects, similarly numbered or designated, are drawn or electronically determined, and

(III) in which the game is won by the first person covering a previously designated arrangement of numbers or designations on such cards,

including (if played in the same location) pull-tabs, lotto, punch boards, tip jars, instant bingo, and other games similar to bingo, and

(ii) card games that –

(I) are explicitly authorized by the laws of the State, or

(II) are not explicitly prohibited by the laws of the State and are played at any location in the State,

but only is such card games are played in conformity with those laws and regulations (if any) of the State regarding hours or periods of operation of such card games or limitations on wagers or pot sizes in such card games.

(B) The term "class II gaming" does not include –

(i) any banking card games, including baccarat, chemin de fer, or blackjack (21), or

(ii) electronic or electromechanical facsimiles of any game of chance or slot machines of any kind.

. . .

(8) The term "class III gaming" means all forms of gaming that are not class I gaming or class II gaming.

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25 U.S.C. § 2710. Tribal gaming ordinances

(b) Regulation of Class II gaming activity; net revenue allocation; audits; contracts

(1) An Indian tribe may engage in, or license and regulate, class II gaming on Indian lands within such tribe's jurisdiction, if –

(A) such Indian gaming is located within a State that permits such gaming for any purpose by any person, organization or entity (and such gaming is not otherwise specifically prohibited on Indian lands by Federal law), and

(B) the governing body of the Indian tribe adopts an ordinance or resolution which is approved by the Chairman.

A separate license issued by the Indian tribe shall be required for each place, facility, or location on Indian lands at which class II gaming is conducted.

* * *

(d) Class III gaming activities; authorization; revocation; Tribal-State compact

(1) Class III gaming activities shall be lawful on Indian lands only if such activities are –

(A) authorized by an ordinance or resolution that –

(i) is adopted by the governing body of the Indian tribe having jurisdiction over such lands,

(ii) meets the requirements of subsection (b) of this section, and

(iii) is approved by the Chairman,

(B) located in a State that permits such gaming for any purpose by any person, organization, or entity, and

(C) conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State under paragraph (3) that is in effect.

* * *

Idaho Constitution Article III § 20

ORIGINAL

"§ 20. Gambling not to be authorized. – No game of chance, lottery, gift enterprise or gambling shall be authorized under any pretense or for any purpose whatever, except for the following:

"a. A state lottery which is authorized by the state if conducted in conformity with law; and

"b. Pari-mutuel betting if conducted in conformity with law; and

"c. Charitable games of chance which are operated by qualified charitable organizations in the pursuit of charitable purposes if conducted in conformity with law."

Idaho Constitution Article III § 20

AMENDED

§ 20. Gambling prohibited. – (1) Gambling is contrary to public policy and is strictly prohibited except for the following:

a. A state lottery which is authorized by the state if conducted in conformity with enabling legislation; and

b. Pari-mutuel betting if conducted in conformity with enabling legislation; and

c. Bingo and raffle games that are operated by qualified charitable organizations in the pursuit of charitable purposes if conducted in conformity with enabling legislation.

(2) No activities permitted by subsection (1) shall employ any form of casino gambling including, but not limited to, blackjack, craps, roulette, poker, bacarrat [baccarat], keno and slot machines, or employ any electronic or electromechanical imitation or simulation of any form of casino gambling.

(3) The legislature shall provide by law penalties for violations of this section.

(4) Notwithstanding the foregoing, the following are not gambling and are not prohibited by this section:

a. Merchant promotional contests and drawings conducted incidentally to bona fide nongaming business operations, if prizes are awarded without consideration being charged to participants; and

b. Games that award only additional play.

ORIGINAL

Idaho Code 18-3801. Gambling. – Every person who deals, plays or carries on, opens or causes to be opened, or who conducts, either as owner, employee, or lessee, whether for hire or not, any game of faro, monte, roulette, lansquenet, rouge et noir, rondo, Indian stick game, or any game played with cards, dice or any other device for money, checks, credit or any other representative of values, is guilty of a misdemeanor and is punishable by fine not less than $200 nor more than $1,000 or imprisonment in the county jail not less than two (2) months nor more than twelve (12) months or both such fine and imprisonment.

AMENDED

Idaho Code 18-3801. Gambling defined. – "Gambling" means risking any money, credit, deposit or other thing of value for gain contingent in whole or in part upon lot, chance, the operation of a gambling device or the happening or outcome of an event, including a sporting event, the operation of casino gambling including, but not limited to, blackjack, craps, roulette, poker, bacarrat [baccarat] or keno, but does not include:

(1) Bona fide contests of skill, speed, strength or endurance in which awards are made only to entrants or the owners of entrants; or

(2) Bona fide business transactions which are valid under the law of contracts; or

(3) Games that award only additional play; or

(4) Merchant promotional contests and drawings conducted incidentally to bona fide nongaming business operations, if prizes are awarded without consideration being charged to participants; or

(5) Other acts or transactions now or hereafter expressly authorized by law.

AMENDED

Idaho Code 18-3802. Gambling prohibited. – (1) A person is guilty of gambling if he:

(a) Participates in gambling; or

(b) Knowlingly [sic] permits any gambling to be played, conducted or dealt upon or in any real or personal property owned, rented, or under the control of the actor, whether in whole or in part.

(2) Gambling is a misdemeanor.

* * *

Idaho Code 18-3809. Book making and pool selling. – Any person who for gain, hire or profit engages in pool selling or book making at any time or place within this state; or any person who keeps or occupies any room, shed, tenement, tent, booth or building, float or vessel, or

any part thereof, or who occupies any place or stand of any kind, upon any public or private grounds within this state, with books, papers, paraphernalia, or mechanical device, for the purpose of engaging in pool selling or book making, or recording or registering bets or wagers; or who sells pools or makes books upon the result of any trial or contest of skill, speed or power of endurance of man or beast for gain, hire or reward; or any person who, for gain, hire or reward, receives, registers, records and forwards to any other place, within or without this state, any money, consideration or thing of value for the purpose of having it there bet or wagered by or for any person, who at such place sells pools or makes books upon any such event, or any person who, being the owner, lessee or occupant of any such room, shed, tenement, tent, booth or building, float or vessel, or part thereof, or any grounds within this state, knowingly and wilfully permits the same to be occupied and used for any of the purposes aforesaid; unless unable to legally prevent the same; or any person who aids, assists or abets in any manner in any of said acts which are hereby forbidden, is guilty of a misdemeanor, and upon conviction is punishable by a fine of not more than $300 or by imprisonment in the county jail for a period of not more than six (6) months or by both such fine and imprisonment.

Idaho Code 18-3810. Slot machines – Possession unlawful – Exception. – (1) Except as otherwise provided in this section, it shall be a misdemeanor and punishable as provided in section 18-3801, Idaho Code, for any person

to use, possess, operate, keep, sell, or maintain for use or operation or otherwise, anywhere within the state of Idaho, any slot machine of any sort or kind whatsoever.

(2) The provisions of section 18-3804, Idaho Code, shall not apply to antique slot machines. For the purpose of this section, an antique slot machine is a slot machine manufactured prior to 1950, the operation of which is exclusively mechanical in nature and is not aided in whole or in part by any electronic means.

(3) Antique slot machines may be sold, possessed or located for purposes of display only and not for operation.

(4) An antique slot machine may not be operated for any purpose.

* * *

Idaho Code 18-4901. Lottery defined. – A lottery is any scheme for the disposal or distribution of property by chance among persons who have paid or promised to pay any valuable consideration for the chance of obtaining such property, or a portion of it, or for any share or interest in such property, upon any agreement, understanding or expectation that it is to be distributed or disposed of by lot or chance, whether called a lottery, raffle, or gift enterprise, or by whatever name the same may be known. The pari-mutuel system used in racing shall not constitute a lottery, so long as it is conducted in conformity with the provisions of chapter 25, title 54, Idaho Code.

Idaho Code 18-4902. Engaging in lottery. – Every person who contrives, prepares, sets up, proposes, or draws any lottery is guilty of a misdemeanor.

* * *

Idaho Code 54-2502. Definitions. – Unless the context otherwise requires, words and phrases as used herein shall mean: . . .

* * *

"Race meet" shall mean and include any exhibition of thoroughbred, purebred, and/or registered horse racing, mule racing or dog racing, where the pari-mutuel system of wagering is used. Singular shall include the plural and plural shall include the singular; and words importing one gender shall be regarded as including all other genders.

Idaho Code 54-2512. Pari-mutuel betting – Other betting illegal. – (1) Any licensee conducting a race meet under this act may provide a place or places in the race meet grounds or enclosure at which such licensee may conduct and supervise the use of the pari-mutuel system by patrons on the results of the races conducted by such licensee at such race meet and, upon written application by a licensee and approval by the commission, on the result of simulcast and/or televised races.

(2) Licenses authorizing simulcast and/or televised races will be regulated by the commission, in addition to their other responsibilities, for the purpose of enhancing, promoting, and protecting the live race industry in the state of Idaho. No license authorizing simulcasting and/or televised races shall be issued where live race meets have not been conducted annually at the facility named in the application during the preceding two (2) years and, with the exception of pari-mutuel greyhound racing, no license authorizing simulcasting and/or televised races shall be granted if such live race meet facility does not run at least ninety percent (90%) of the number of live races that were conducted in 1989.

(3)(a) The commission shall not grant a license that allows a simulcast and/or televised broadcast to occur within seventy-five (75) miles of a licensed live race meet at another facility within the state, without written permission from each facility involved.

(b) In addition to the restrictions recited in paragraph (a) of this subsection, in counties whose population exceeds on hundred fifty thousand (150,000), the commission shall not grant a license that allows a simulcast and/or televised broadcast to occur within the fourteen (14) days prior to a licensed live race meet at another facility within the state, without written permission from each facility involved.

(4) To further protect the live race industry, a petition, signed by not less than seventy-five (75) bona fide owners, breeders and/or trainers may be submitted to the commission which will require a public hearing to be

held regarding the reissuance of a license authorizing simulcasting and/or television broadcasting of races.

Such pari-mutuel system conducted at such race meet shall not under any circumstances, if conducted under the provisions of this act and in conformity thereto and to the rules and regulations of the commission, to be held or construed to be unlawful, other statutes of this state to the contrary notwithstanding.

(5) The participation by a licensee in an interstate combined wagering pool does not cause that licensee to be considered to be doing business in any jurisdiction other than the jurisdiction in which the licensee is physically located.

(6) Pari-mutuel taxes or commissions may not be imposed on any amounts wagered in an interstate combined wagering pool other than amounts wagered within this jurisdiction.

(7) It shall be unlawful to conduct pool selling, book making, or to circulate hand books, or to bet or wager on a race of any licensed race meet, other than by the pari-mutuel system; and it shall further be unlawful knowingly to permit any minor to use the pari-mutuel system.

* * *

Idaho Code 67-7401. Purpose. – The purpose of this legislation is to establish a state lottery to generate revenue for the state with a director and a state lottery commission to oversee lottery operations. This chapter establishes a state lottery account for the deposit of receipts, for payment of prizes and expenses, and provides that revenues generated in the lottery account, after allowances for prizes and expenses, shall be distributed for the public benefit. This chapter provides for contracting with lottery retailers and authorizes the promulgation of administrative rules and regulations necessary for carrying out the intent of this chapter. The lottery commission and the director of the lottery shall be responsible for operating the lottery at the least public expense and the smallest staffing possible, commensurate with all other policies stated in this chapter. Additionally, all advertising by the lottery shall be conducted in a manner consonant with the dignity of the state and the sensibilities of its citizens. [I.C. § 67-7401, as added by 1988, ch. 232, § 2, p. 446.]

Idaho Code 67-7404. Definitions. – As used in this chapter: . . .

* * *

(14) "Share" means any intangible evidence of participation in a game conducted by the state lottery.

(15) "Ticket" means any tangible evidence issued by the lottery to provide participation in a game conducted by the state lottery.

* * *

Idaho Code 67-7447. Lawful activity. – Chapters 38 and 49, Title 18, Idaho Code, or any other state or local law or regulation providing any penalty, disability, restriction, regulation or prohibition for the manufacture, transportation, storage, distribution, advertising, possession, or sale of any lottery tickets or shares or for the operation of any lottery game shall not apply to the tickets or shares of the state lottery established in this chapter.

* * *

C.R. 49(5)

Affidavit of
Earnest Stensgar

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1992 CLASS III GAMING COMPACT

By and Between the

COEUR D'ALENE TRIBE

and the

STATE OF IDAHO

This Tribal-State Compact is made and entered into by and between the Coeur d'Alene Tribe ("Tribe"), a federally recognized Indian Tribe, and the State of Idaho ("State") pursuant to the provisions of the Indian Gaming Regulatory Act. Pub. L. 100-497, 102 Stat. 2425, codified at 25 U.S.C. § 2701 *et seq.* and 18 U.S.C. §§ 1166-1168 (the "Act"). Whereby, the parties herein do promise, covenant and agree as follows:

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4.15 "Pari-mutuel" means a system of wagering on a race or sporting event whereby the winners divide the total amount wagered, in proportion to the amount individually wagered, after deducting commissions, fees and taxes.

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4.18 "State gaming agency" means the Idaho agency designated by the Governor by written notice to the Tribe as the single state agency primarily responsible

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for oversight of Class III gaming as authorized by this Compact.

4.19 "State lottery" means;

.1 The scratch-off game in which a player purchases a paper ticket that has groupings of numbers or symbols that are covered with a material that can be scratched off, thereby exposing the numbers or symbols. The player wins a prize if his ticket contains a pre-set combination of numbers or symbols; and

.2 The numbers game commonly known as lotto in which a player purchases a paper ticket containing a series of numbers (often 5, 6 or 7 numbers) and wins a prize if all or some of these numbers are selected at a random drawing; and

.3 The pull-tab game in which a player purchases a paper product that, when pulled apart, reveals a grouping of numbers or symbols. A player wins a prize if his ticket contains a pre-set combination of numbers or symbols; and

.4 Any other type of game that the State hereafter conducts as a lottery game.

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ARTICLE 6. AUTHORIZED CLASS III GAMING

6.1 **Disputed Issues.** The parties have been unable to agree upon the types of Class III games permitted by

the act to be played by the Tribe and whether restrictions on the scale of operations are allowed under the Act.

.1 The State takes the following positions:

a) Types of Games. Under the applicable laws of the State before and after passage of HJR 4 (1992), the Act permits only state lottery, pari-mutuel betting on racing, and the simulcast thereof as authorized Class III games in Idaho.

b) Restrictions. The Act permits the State to negotiate reasonable restrictions and requirements for the conduct and operation of gaming in furtherance of the public interest, including negotiated limits upon the scale of operations of other Class III games, should they be allowed.

.2 The Tribe takes the following positions:

a) Types of Games. Under either Section 20, Article III, of the Idaho Constitution and the applicable Laws of the State or the amendment to Section 20, Article III, of the Idaho State Constitution by HJR 4, 51st Idaho Leg. Special Session (1992), the Act permits the Tribe to engage in all games that contain the elements of chance and or skill, prize and consideration.

b) Restrictions. The Act prohibits a state from imposing restrictions on the scale of operation of allowable games which reduce either the revenue to the Tribe, or

the potential for Tribal economic development. Scale of operation restrictions include state-imposed limits on the number of gaming machines and gaming tables as well as limits on the size of prizes and bets.

.3 Both the Tribe and the State acknowledge that these legal issues should be resolved and concluded. In recognition of this, the Tribe and the State agree in this Compact to resolve issues that can be agreed upon and agree to establish a process for resolving the disputed matters.

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6.2 **Gaming Authorized.** Following approval of this Compact as provided in the Act, the Tribe may operate in its gaming facilities located on Indian lands the following types of games.

.1 Lottery: those lottery games defined as "State lottery" in Article 4.19.

.2 Pari-mutuel betting:

a) on the racing of horses;

b) on the racing of dogs;

c) on the racing of mules; and

d) on the simulcast of a, b, or c.

.3 Any additional type of game involving chance and/or skill, prize and consideration that may hereafter be authorized to be conducted in the State.

6.3 **No Restrictions on Authorized Gaming.** Except as otherwise provided in this Compact, gaming authorized in Article 6.2.1 and 6.2.2 shall not be subject to any State restrictions, including the Tribe's advertising or promotion of the authorized games or any intrastate or interstate aspects of the permitted games. Provided, this section is not intended to permit gaming except on Indian lands as defined in Article 4.9.

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6.4 **Judicial Remedy.** The Tribe and the State agree that the ultimate issues of what gaming the Tribe may conduct under the Act and what restrictions on the operations, if any, may be imposed, are ultimately questions of law.

.1 It is the Tribe's position that the Act has vested exclusive jurisdiction in the United States District Courts to resolve disputes under the Act.

.2 The State does not consent to jurisdiction of the federal court over any claim under the Act. However, the Tribe and the State agree that, in lieu of a "bad faith" claim under the Act, either party may file suit for declaratory judgment in the United States District Court for the District of Idaho naming the other as a defendant and seeking a declaration of the legal issues disputed in this Article 6. Both parties agree to seek the necessary legal authority, merge declaratory judgment actions, or take other steps as may be necessary to participate in such an action on its merits. This agreement shall not in

any way prejudice any right to appeal or seek review of any judgment.

.3 The parties agree to expedite any appeal or review of any final order or judgment entered in such declaratory judgment action.

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6.5 **Post Declaratory Judgment.** Upon the conclusion of all legal proceedings in a declaratory judgment action brought pursuant to Article 6.4, including the conclusion of all appeals or review, the appropriate provisions below shall apply:

.1 In the event the court(s) determines that no additional types of games are permitted in Idaho under the Act, the Tribe's gaming shall be limited to the gaming authorized in Article 6.2.

.2 In the event the court(s) determines that additional types of games are permitted in Idaho under the Act, the Tribe may conduct such games as are consistent with that judgment upon conclusion of negotiations and/or arbitration as provided for in Article 6.6.1.

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Calendar No. 862

100TH CONGRESS
2d Session

SENATE

REPORT
100-446

INDIAN GAMING REGULATORY ACT

AUGUST 3 (legislative day, AUGUST 1).
1988. – Ordered to be printed

MR. INOUYE, from the Select Committee on Indian Affairs, submitted the following

REPORT

together with

ADDITIONAL VIEWS

[To accompany S. 555]

S. 555 is intended to expressly preempt the field in the governance of gaming activities on Indian lands. Consequently, Federal courts should not balance competing Federal, State, and tribal interests to determine the extent to which various gaming activities are allowed.

Finally, the Committee anticipates that Federal courts will rely on the distinction between State criminal laws which prohibit certain activities and the civil laws of a State which impose a regulatory scheme upon those activities to determine whether class II games are allowed in certain States. This distinction has been discussed by the Federal courts many times, most recently and notably by the Supreme Court in *Cabazon*. Under Public Law S3-280, the prohibitory/regulatory distinction is used to

determine the extent to which State laws apply through the assertion of State court jurisdiction on Indian lands in Public Law 280 States. The Committee wishes to make clear that, under S. 555, application of the prohibitory/regulatory distinction is markedly different from the application of the distinction in the context of Public Law 83-280. Here, the courts will consider the distinction between a State's civil and criminal laws to determine whether a body of law is applicable, as a matter of Federal law, to either allow or prohibit certain activities. The Committee does not intend for S. 555 to be used in any way to subject Indian tribes or their members who engage in class II games to the criminal jurisdiction of States in which criminal laws prohibit class II games.

* * *

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Class II gaming is defined in section 4(8)(A)(B)(C) and (D) Consistent with tribal rights that were recognized and affirmed in the *Cabazon* decision, the Committee intends in section 4(8)(A)(i) that tribes have maximum flexibility to utilize games such as bingo and lotto for tribal economic development. The Committee specifically rejects any inference that tribes should restrict class II games to existing games sizes, levels of participation, or current technology. The Committee intends that tribes be given the opportunity to take advantage of modern methods of conducting class II games and the language regarding technology is designed to provide maximum flexibility. In this regard, the Committee recognizes that tribes may wish to join with other tribes to coordinate their class II

operations and thereby enhance the potential of increasing revenues. For example, linking participant players at various reservations whether in the same or different States, by means of telephone, cable, television or satellite may be a reasonable approach for tribes to take. Simultaneous games participation between and among reservations can be made practical by use of computers and telecommunications technology as long as the use of such technology does not change the fundamental characteristics of the bingo or lotto games and as long as such games are otherwise operated in accordance with applicable Federal communications law. In other words, such technology would merely broaden the potential participation levels and is readily distinguishable from the use of electronic facsimiles in which a single participant plays a game with or against a machine rather than with or against other players.

* * *

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Class II. – Section 11(a)(2) stipulates that class II gaming remains within tribal jurisdiction but is subject to the provisions of the act where two conditions are met: The State within which the tribe is located must permit such gaming for any purpose by any entity; and such gaming is not otherwise prohibited by Federal law. The Committee recognizes that tribal jurisdiction over class II gaming has not been previously addressed by Federal statute and thus there has heretofore been no divestment or transfer of such inherent tribal governmental powers by the Congress.

There are five States (Arkansas, Hawaii, Indiana, Mississippi, and Utah) that criminally prohibit any type of gaming, including bingo. S. 555 bars any tribe within those States, as a matter of Federal law, from operating bingo or any other type of gaming. In the other 45 States, some forms of bingo are permitted and tribes with Indian lands in those States are free to operate bingo on Indian lands, subject to the regulatory scheme set forth in the bill. The card games regulated as class II gaming are permitted by far fewer States and are subject to requirements set forth in section 4(8). The phrase "for any purpose by any person, organization or entity" makes no distinction between State laws that allow class II gaming for charitable, commercial, or governmental purposes, or the nature of the entity conducting the gaming. If such gaming is not criminally prohibited by the State in which tribes are located, then tribes, as governments, are free to engage in such gaming.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RUMSEY INDIAN RANCHERIA OF WINTUN INDIANS; TABLE MOUNTAIN RANCHERIA; CHER-AE HEIGHTS INDIAN COMMUNITY OF THE TRINIDAD RANCHERIA; SAN MANUAL BAND OF MISSION INDIANS, VIEJAS RESERVATION OF THE CAPITAN GRAND BAND OF DIEGUENO MISSION INDIANS AND HOPLAND BANK OF POMO INDIANS; BARONA BAND OF MISSION INDIANS; SYCUAN BANK OF MISSION INDIANS; AGUA CALIENTE BAND OF CAHUILLA INDIANS, *Plaintiffs-Appellees,* v. PETE WILSON, Governor; STATE OF CALIFORNIA, *Defendants-Appellants.*	No. 93-16609 D.C. No. CV-92-00812-GEB ORDER, DISSENT, CONCURRENCE, AND AMENDED OPINION

RUMSEY INDIAN RANCHERIA OF WINTUN INDIANS; TABLE MOUNTAIN RANCHERIA; CHER-AE HEIGHTS INDIAN COMMUNITY OF THE TRINIDAD RANCHERIA; SAN MANUAL BAND OF MISSION INDIANS, VIEJAS RESERVATION OF THE CAPTAIN

GRANDE BAND OF DIEGUENO MISSION INDIANS AND HOPLAND BAND OF POMO INDIANS; WINTUN INDIANS; SAN MANUAL BAND OF MISSION INDIANS; CABAZON BAND OF MISSION INDIANS; THE SANTA YNEZ BAND OF CHUMASH MISSION INDIANS OF THE SANTA YSABEL RESERVATION, CALIFORNIA; VIEJAS RESERVATION OF THE CAPITAN GRANDE BAND OF DIEGUENO MISSION INDIANS; SAN MANUAL BAND OF MISSION INDIANS; THE HOPLAND BAND OF POMO INDIANS; THE SYCUAN BAND OF MISSION INDIANS; THE MORONGO BAND OF MISSION INDIANS; THE SANTA ROSA BAND OF TACHE INDIANS; THE CACHIL DEHE BAND OF WINTUN INDIANS OF THE COLUSA INDIAN COMMUNITY; THE SOBOBA BAND OF CAHUILLA MISSION INDIANS; THE ROBINSON BAND OF POMO INDIANS; THE AGUA CALIENTE BAND OF CAHUILLA INDIANS; and THE BARONA GROUP OF THE CAPITAN GRANDE BAND OF MISSION INDIANS,

Plaintiffs-Appellees-Cross-Appellants,

v.

PETE WILSON, Governor; STATE OF CALIFORNIA,

Defendants-Appellants-Cross-Appellees.

No. 93-16745

D.C. No. CV-92-00972-GEB

Appeals from the United States District Court
for the Eastern District of California
Garland E. Burrell, District Judge, Presiding

Argued and Submitted
May 10, 1994 – San Francisco, California

Filed November 15, 1994
Amended August 11, 1995

Before: J. Clifford Wallace, Chief Judge;
Diarmuid F. O'Scannlain, Circuit Judge;
Robert J. Kelleher,* District Judge.

Opinion by Judge O'Scannlain;
Concurrence by Chief Judge Wallace;
Dissent to Order by Judge Canby;
Concurrence to Dissent by Judges Ferguson and Norris

* * *

The panel has voted to deny the petitions for rehearing. Chief Judge Wallace and Judge O'Scannlain have voted to reject the suggestions for rehearing en banc, and Judge Kelleher has so recommended.

The full court was advised of the suggestions for rehearing en banc. An active judge requested a vote on whether to rehear the matter en banc. The matter failed to receive a majority of the votes of the nonrecused active judges in favor of en banc consideration. Fed. R. App. P. 35.

The petitions for rehearing are DENIED and the suggestions for rehearing en banc are REJECTED.

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* The Honorable Robert J. Kelleher, Senior United States District Judge for the Central District of California, sitting by designation.

CANBY, Circuit Judge, joined by PREGERSON, REINHARDT, and HAWKINS, Circuit Judges, dissenting from the denial of rehearing en banc:

This is a case of major significance in the administration of the Indian Gaming Regulatory Act ("IGRA") and it has been decided incorrectly, in a manner that conflicts with the Second Circuit's interpretation of the same statutory language. The result is to frustrate the scheme of state-tribal negotiation that Congress established in IGRA. We should have granted rehearing en banc to prevent the near-nullification of IGRA in a circuit that encompasses a great portion of the nation's Indian country. Our failure to do so may close the only route open to many tribes to escape a century of poverty.

Ramsey holds that California, which permits several varieties of Class III gambling, has no duty under IGRA to negotiate with the tribes over the tribes' ability to conduct any game that is illegal under California law. This ruling effectively frustrates IGRA's entire plan governing Class III Indian gaming. The primary purpose of IGRA, as set forth in the Act, is "to provide a statutory basis for the operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments." 25 U.S.C. § 2702(1). IGRA's otherwise drastic extension of state gaming law to Indian country (to be enforced only by the federal government) was modified by IGRA's process by which the states and tribes could arrive at compacts specifying what games might be allowed and who might have jurisdiction to enforce gaming laws. *See* 25 U.S.A. §§ 2710(3); 18 U.S.C. § 1166(c)(2) (exempting Class III gaming conducted pursuant to a tribal-state compact

from the application of state gaming laws extended into Indian country by § 1166(a)). The whole idea was to foster these compacts. That goal is defeated if the details of the state's regulatory schemes, allowing some games and prohibiting others, apply if the state does nothing. Thus the Second Circuit, in arriving at a conclusion precisely opposite to that of *Rumsey*, stated:

> Under the State's approach, . . . even where a state does not prohibit class III gaming as a matter of criminal law and public policy, an Indian tribe could nonetheless conduct such gaming only in accord with, and by acceptance of, the entire state corpus of laws and regulations governing such gaming. The compact process that Congress established as the centerpiece of the IGRA's regulation of class III gaming would thus become a dead letter; there would be nothing to negotiate, and no meaningful compact would be possible.

Mashantucket Pequot Tribe v. Connecticut, 913 F.2d 1024, 1030-31 (2d Cir. 1990).[1]

The Second Circuit's fears of turning IGRA's compact process into a dead letter are well-founded. It is well to keep in mind that the issue here is not whether California must allow every game the tribes want to conduct; it is merely whether California has a duty to negotiate with the tribes to determine what games should be conducted,

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[1] We recognize that *Rumsey's* approach is supported by the Eighth Circuit, *Cheyenne River Sioux Tribe v. South Dakota*, 3 F.3d 273 (8th Cir. 1993), but for the reasons stated we believe that the Second Circuit has much the better overview of IGRA.

on what scale, and who has jurisdiction to enforce gaming laws. In passing IGRA, Congress knew that states and tribes both had important interests at stake. If a state has a genuine prohibitory public policy against all Class III gaming, as some states do, it can rest on that policy and not entertain the possibility of Indian Class III gaming within its borders. States like California that have no such wholesale public policy against Class III gaming must, under IGRA, reach an accommodation between their interests and the strong interests of the tribes in conducting such gaming, IGRA's method of reaching such an accommodation is by negotiation between the two affected groups. IGRA imposes on the states a duty to negotiate compacts in good faith. That duty is enforceable in federal court with the aid, if necessary, of a court appointed mediator to arrive at a compact and the Secretary of the Interior to dictate a compact if the parties do not accept the mediator's ruling. 25 U.S.C. § 2710(d)(7). But under *Rumsey,* this whole process is nipped in the bud if the tribe seeks to operate games that state law, criminal *or* regulatory, happens to prohibit. The state has no duty to begin negotiations, even though under IGRA a compact may permit the tribe to operate games that state law otherwise prohibits. 18 U.S.C. § 1166(c)(2). The State thus has no incentive to negotiate, and there is no system to require negotiation. IGRA is rendered toothless.

Such a nullifying interpretation of IGRA might be understandable if it were required by the plain words of the statute, but it is not. *Rumsey* defeats the congressional plan for Class III gaming by a manifestly flawed interpretation of the statutory language. In deciding that California had no duty to negotiate with the plaintiff tribes,

the *Rumsey* opinion asked and answered the wrong question. IGRA provides:

> *Class III gaming* activities shall be lawful on Indian lands only if such activities are –
>
> . . . .
>
> (B) located in a State that *permits such gaming* for any purpose by any person, organization, or entity. . . .

25 U.S.C. § 2710(d)(1)(B) (emphasis added). Thus the state must negotiate with a tribe if the state "permits such gaming." The *Rumsey* opinion regards the key question as being whether the word "permits" is ambiguous; it holds that the word is not ambiguous, so the State need not bargain. But the proper question is not what Congress meant by "permits," but what Congress meant by "such gaming." Did it mean the particular game or games in issue, or did it mean the entire category of Class III gaming? The structure of IGRA makes clear that Congress was dealing categorically, and that a state's duty to bargain is not to be determined game-by-game. The time to argue over particular games is during the negotiation process.

The only natural reading of section 2710(d)(1)(B) is that, when Congress says "Class III gaming activities shall be lawful . . . if located in a State that permits such gaming," then "such gaming" refers back to the category of "Class III gaming," which is the next prior use of the word "gaming." *Rumsey* interprets the statutory language as if it said: "A Class III game shall be lawful . . . if located in a State that permits that game." But that is not what Congress said, and it is not a natural reading of the

statutory language. The plain language cuts directly against *Rumsey;* Congress allows a tribe to conduct Class III gaming activities (pursuant to a compact) if the State allows Class III gaming by anyone.

Furthermore, Class II gaming is governed by virtually identical language in section 2710(b)(1)(A). A tribe may conduct and regulate *"Class II gaming . . .* if such Indian gaming is located within a State that *permits such gaming* for any purpose by any person, oroganization or entity. . . . " 25 U.S.C. § 2710(b)(1)(A) (emphasis added). We have held that the state cannot allow or disallow Class II Indian gaming game-by-game. *Sycuan Band of Mission Indians v. Miller,* 54 F.3d 535 (9th Cir. 1995) (amended opinion). Our decision in *Sycuan Band* followed the reasoning of the Supreme Court in *California v. Cabazon Band of Mission Indians,* 480 U.S. 202 (1987), the seminal Indian gaming case that ultimately led to the passage of IGRA. In deciding for purposes of Public Law 280 whether California's prohibition of high-stakes bingo could be enforced against the Band, the Supreme Court noted that "[t]he shorthand test is whether the conduct at issue violates the State's public policy." After reviewing California's treatment of gambling, the Court stated:

> In light of the fact that California permits a substantial amount of gambling activity, including bingo, and actually promotes gambling through its state lottery, we must conclude that California regulates rather than prohibits *gambling in general* and bingo in particular.

Id. at 211 (emphasis added). Thus, *Cabazon Band* ascertained California's public policy at a level of generality

far above that of the individual game in issue, and concluded that the Band could conduct high-stakes bingo even though California made that activity a misdemeanor. We applied a similarly broad and categorical approach to Class II gaming in *Sycuan Band*.

The *Rumsey* opinion refuses to apply the reasoning of *Cabazon Band* and *Cycuan Band*, and instead holds that a class-wide, categorical approach is precluded by the "unambiguous" plain words of section 2710(d)(1)(B), even though identical words in section 2710(b)(1)(A) require a contrary result for Class II gaming. The majority in *Rumsey* justifies its interpretation by referring to the Senate Committee Report on IGRA, which approves the approach of *Cabazon Band* for Class II gaming but says nothing about *Cabazon Band's* applicability to Class III gaming. *See* Sen. Rep. No. 100-446, 1988 U.S.C.C.A.N. 3071, 3076. But we should not read a congressional negative into a committee report's failure to mention *Cabazon Band* in regard to Class III gaming. *Cabazon Band* dealt with games that IGRA placed in Class II, and that is explanation enough why the discussion of *Cabazon Band* in the Committee's report arose only in connection with Class II gaming. The fact remains that Congress wrote provisions of essentially identical wording and structure to govern both Class II and Class III gaming. We should give them both the same categorical meaning.

Rumsey has thus misconstrued IGRA's Class III gaming provisions, and has done so in a manner that defeats Congress's intention and causes great economic harm to numerous tribes. With all respect to the *Rumsey* panel, we dissent from the denial of rehearing en banc.

FERGUSON and NORRIS, Senior Circuit Judges:

We agree with the views expressed by Judge Canby.

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